(26,706)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 620.

MERGENTHALER LINOTYPE COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL W. DAVIS AND W. B. HAYS.

IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1918.

a *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Springfield Court of Appeals of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Springfield Court of Appeals of the State of Missouri, before you, or some of you, being the highest Court of law or equity of the said State in which a decision can be had in the said suit between Mergenthaler Linotype Company, a corporation, plaintiff, and Samuel W. Davis and W. B. Hays, Defendants, numbered 1509, wherein was drawn in question the validity of a statute or treaty of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the Mergenthaler Linotype Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly, and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. on the — day
b of ——, next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this — day of ——, A. D. 1918.

Issued at office in the City of Springfield, with the seal of the

District Court of the United States for the Southern Division of the Western District of Missouri, dated as aforesaid.

[Seal of the United States District Court, Southern Division of the Western Judicial District of Missouri.]

JOHN B. WARNER,
Clerk United States District Court for the Southern Division, Western District, Missouri,
By GEORGE PUPPERDINE, *Deputy.*

Allowed by:
JOHN T. STURGIS,
Presiding Justice Supreme Court of Appeals of the State of Missouri.

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Springfield Court of Appeals, at Springfield, Missouri, this 12th day of Aug. A. D. 1918.

[Seal The Springfield Court of Appeals, Missouri.]

BEN M. NEALE,
Clerk Springfield Court of Appeals of the State of Missouri,
Per FRANCES P. DANIEL, *D. C.*

[Endorsed:] Mergenthaler Linotype Co., P. E., vs. Davis et al., D. E. Writ of Error.

c STATE OF MISSOURI,
County of Greene, ss:

In obedience to the command of the within Writ, I, Ben M. Neale, Clerk of the Springfield Court of Appeals, do herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings wherein the Mergenthaler Linotype Company is Respondent, and W. B. Hays et al., are Appellants, together with all things concerning the same, as it now appears of record in my said office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Springfield Court of Appeals, at my office in the City of Springfield, County of Greene and State of Missouri, this 12 day of August, A. D. 1918.

[Seal The Springfield Court of Appeals, Missouri.]

BEN M. NEALE,
Clerk of the Springfield Court of Appeals.

1 In the Springfield Court of Appeals, Poplar Bluff Call, to October Term, 1915.

No. 1509.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff-respondent,

vs.

SAMUEL W. DAVIS, Defendant, and W. B. HAYS, Defendant-appellant.

Appeal from the Circuit Court of Butler County.

Appellant's Abstract of the Record.

This is an action instituted by the plaintiff to recover the amount of rental alleged to be due under an alleged contract of lease. This is the second appeal in this case, the first appeal being reported in 182 Mo. App. 113.

2 After the cause was reversed and remanded on the first appeal, plaintiff, on the 5th day of October, 1914, filed an amended petition, on which the case was tried, and which is as follows, to-wit:

(Caption Omitted.)

Now at this time comes the plaintiff in the above entitled cause by its attorney and, by leave of the court first had and obtained, files this, plaintiff's first amended petition and, for such amended petition, plaintiff states:

That the plaintiff is now and was at all the times hereinafter mentioned a business corporation duly organized and existing under and by virtue of the laws of the State of New York, engaged in the manufacture, leasing and distribution of linotype machines; and that the defendants were at all the times hereinafter mentioned, partners owning and operating a printing company known as the "Citizen-Democrat," in the City of Poplar Bluff, Butler County, Missouri.

Plaintiff further states that on the 12th day of May, A. D. 1910, the plaintiff entered a written contract with the defendants, whereby the plaintiff agreed to lease and rent to the defendant for the term of six years from the date of the contract, one two-letter lino-

3 type machine, Model 5, No. 14088, and one two-letter duplex equipment at an annual rental of six hundred thirty-two dollars and fifty cents, due and payable each year in advance, which annual rental for each and every year since the execution of said contract became due on the 14th day of June each year.

Plaintiff further states that the defendants, by the terms of said written contract so executed as aforesaid, agreed to pay said annual rental of six hundred thirty-two dollars and fifty cents for said lino-

type machine and equipment, in advance, each year on the 14th day of June, and also agreed to pay to the plaintiff during the term of said written contract or lease, in addition to the annual rental, the cost of insuring said machine, its belongings and accessories during the whole of the term provided in said written contract or lease against loss or damage by fire to the amount of 1150, for the benefit of the plaintiff; that by virtue of said clause in said written contract or lease plaintiff has paid the following premiums for such fire insurance on the leased machine and equipment on the following dates:

December 20, 1911, premium $28.17.

August 21, 1912, premium $24.72.

June 19, 1913, premium $24.73 and

4 June 14, 1914, premium $24.73, which insurance rates did not exceed at any time the local ruling rate at Poplar Bluff, Mo.

Plaintiff further states that by virtue of said written contract or lease, the defendants received and accepted said linotype machine and equipment on or about the 14th day of June, 1910, and have paid to plaintiff the first year's annual rent thereon, to-wit: $632.50, but have failed and refused to pay any of the annual rent thereon thereafter, and have also failed and refused to pay any of the insurance premiums above specified, although the plaintiff has kept and performed all the conditions and obligations imposed upon plaintiff by said written contract or lease, and has demanded from the defendants the payment of the above specified insurance premiums and the annual rental of said linotype machine and equipment each year, when the same became due, while said written contract or lease has been in force.

Plaintiff further states that said written contract or lease is hereto attached, herewith filed, marked Exhibit "A" and made a part of this amended petition.

Plaintiff further states that there is now due from the de-

5 fendants to the plaintiff by virtue of said written contract the total sum of $2,632.35, being the annual rental and insurance premiums above specified; and that there is also due from the defendants to the plaintiff six per cent. interest on $632.50 of said total sum from June 14, 1911, to date of judgment; six per cent. interest on $28.17 of said total sum from December 20, 1911, to date of judgment; six per cent. interest on $632.50 of said total sum from June 14, 1912, to date of judgment; six per cent. interest on $24.72 of said total sum from August 21, 1912, to date of judgment; six per cent. interest on $24.73 of said total sum from June 19, 1913, to date of judgment; six per cent. interest on $632.50 of said total sum from June 14, 1913, to date of judgment; six per cent. interest on $632.50 of said total sum from June 14, 1914, to date of judgment; and six per cent. interest on $24.73 of said total sum from June 14, 1914, to date of judgment.

Wherefore, plaintiff prays judgment against the defendants for the said sum of $2,632.35, with six per cent. interest, as above specified, together with all costs of this suit .

DAVID W. HILL,
Attorney for Plaintiff."

6 To this amended petition the defendant W. B. Hays filed his separate amended answer, which is in words and figures as follows, to-wit:

(Caption Omitted.)

"Now at this time comes W. B. Hays, one of the defendants in the above entitled cause, and by leave of court files this, his amended answer herein; and for said amended answer this defendant states that he denies each and every allegation, statement and averment in plaintiff's petition contained.

Further answering, this defendant states that the plaintiff, Mergenthaler Linotype Company, was on the 12th day of May, 1910, and is now, a foreign corporation, incorporated, organized and existing under and by virtue of the laws of the State of New York, for pecuniary benefit.

Further answering, this defendant alleges that on the 12th day of May, 1910, the date of the making of the alleged agreement set out in plaintiff's petition, and for a long time prior thereto, and thereafter, the said plaintiff, Mergenthaler Linotype Company, was engaged in the transaction of business in the State of Missouri, in this, to-wit: that said plaintiff had and maintained an office in the City of St. Louis, where it carried on the business of leasing,
7 selling and manufacturing linotype machines; that on said 12th day of May, 1910, said plaintiff had in force in the State of Missouri, various leases and contracts, all of which presupposed the employment of a portion of the capital stock of said plaintiff corporation, in the State of Missouri.

Further answering, defendant alleges that notwithstanding the fact that said plaintiff was, on the 12th day of May, 1910, and had been for a long time prior thereto, engaged in transacting business in the State of Missouri, as hereinbefore pointed out, that nevertheless said plaintiff, Mergenthaler Linotype Company, on said 12th day of May, 1910, and at the time of the beginning of this suit, had not complied with the corporation laws of the State of Missouri, relating to foreign corporations, in this to-wit: that said plaintiff, Mergenthaler Linotype Company, a foreign corporation of New York, had not at the time of the making of the alleged contract set out in plaintiff's petition, and at the time of the bringing of this suit, filed with the Secretary of State, of the State of Missouri, a copy of its Articles of Association and Charter granted by the State of New York, and had not then procured from the Secretary of State a license to do business in the State of Missouri; all in viola-
8 tion of the provisions of Sections 3039-3040 Revised Statutes of Missouri, 1909.

Defendant further states that the plaintiff's not having complied with the laws of this State, relating to foreign corporations as aforesaid, and not having received a certificate or license from the Secretary of State, authorizing it to do business in this State as aforesaid, it was and is unlawful for said corporation to transact business in this State, and that, therefore, the contract and lease referred to in plaintiff's petition is illegal and void, and any cause of action on the

same is barred by the provisions of Sections 3039-3040 Revised Statutes, 1909; which said Sections this defendant pleads in bar of the cause of action set up in plaintiff's petition.

Wherefore, having fully answered, this defendant asks to be discharged with his costs in this behalf expended.

HOPE, GREEN & SEIBERT, AND
SHEPPARD, GREEN & SHEPPARD,
Attorneys for Defendant W. B. Hays."

Thereupon, the plaintiff filed its replication, in words and figures as follows, to-wit:

(Caption Omitted.)

9 "Now at this time comes the plaintiff in the above entitled cause, and for reply to the last answer of the defendant, W. B. Hays, herein, denies each and every allegatiion in said answer contained, and again prays judgment in accordance with its petition.

DAVID W. HILL,
Attorney for Plaintiff."

The case was tried at the January Term, 1915, of the Butler County Circuit Court; and on the 19th day of January, 1915, and during said January Term of the Butler County Circuit Court, judgment was rendered in favor of the plaintiff in accordance with the prayer of its petition; which said judgment is in words and figures as follows, to-wit:

(Caption Omitted.)

Now at this time come the parties, plaintiff and defendants in the above entitled cause, by their respective attorneys, and this cause having heretofore been submitted to the court, a jury being waived, and the court having heretofore heard and seen all the evidence offered, and being fully advised in the premises, all and singular, finds the issues in this cause for the plaintiff and against both defendants.

10 The court further finds that the defendants, William B. Hays and Samuel W. Davis are indebted to the plaintiff in the sum of Two Thousand Eight Hundred and Fourteen Dollars and Ninety-two Cents, which includes the debt and six per cent. interest on the amount named in the original petition from the date of the commencement of the suit, and six per cent. interest on the additional amount expressed in the amended petition from the date of the filing thereof to this date; and that the plaintiff is entitled to recover six per cent. interest on said indebtedness from this date.

Wherefore, it is considered, ordered and adjudged by the court that the plaintiff, Mergenthaler Linotype Company, a corporation, have and recover of and from the defendants, William B. Hays and Samuel W. Davis, the said sum of Two Thousand Eight Hundred Fourteen Dollars and Ninety-two Cents, with six per cent. interest thereon from this date, and have execution therefor."

And on the 20th day of January, 1915, and during the same term of court, defendant W. B. Hays filed his motion for a new trial; which said motion was on the same day duly overruled by the court, as is shown by the following record entry:

(Caption Omitted.)

11 "Now come the defendants by their attorneys of record and leave of court first had and obtained, filed their motion for a new trial in the above entitled cause, and the court having now seen and examined said motion and being fully advised in the premises, doth in all things overrule the same."

And thereupon, and on the same day defendant W. B. Hays filed his motion in arrest of judgment; which motion was duly overruled, as is shown by the following record entry:

(Caption Omitted.)

"Now again come the defendants by their respective attorneys and leave of court first had and obtained, file their motion in arrest of judgment in the above entitled cause and the court having now seen and examined said motion and being fully advised in the premises, all and singular, doth in all things overrule the same."

"And thereupon, and on the same day and during the same term of court, defendant W. B. Hays filed his affidavit for an appeal, and an appeal was duly allowed him by the court to this court, and said Circuit Court also granted ninety days from that date to defendant in which to file his Bill of Exceptions, as is shown by the following record entry:

(Caption Omitted.)

12 "Now again come the defendant by Leslie C. Green their attorney and agent, and leave of court first had and obtained, file their application and affidavit in due form for an appeal from the final judgment rendered by the court in the above entitled cause, and the court having now seen and examined said application and affidavit for an appeal, doth sustain the same, and thereupon said defendants are by the court granted an appeal to the Springfield Court of Appeals; and the appeal bond herein is by the court fixed at the sum of Five Thousand Seven Hundred Dollars, and said defendants are granted ten days from the final adjournment of this term of court within which to file said bond and the Clerk of this court is hereby authorized and directed to approve the same; and it is further ordered by the court that said defendants have ninety days from this date within which to perfect, have signed and file their Bill of Exceptions in this cause."

"And thereafter, to-wit: on April 19th, 1915, and within the time previously granted for that purpose, the Circuit Court of Butler

County, by its order of record entered at its April Term, 1915, extended the time in which defendant might file his Bill of Ex-
13 ceptions for a further period of ninety days from said April 19th, 1915; which said last mentioned order is in words and figures as follows, to-wit:

(Caption Omitted.)

"Now at this time for good cause shown to the court, it is hereby ordered that defendants be and they are hereby granted an extension of time for a period of ninety days from the expiration of the time last given, within which to prepare, have signed and file their Bill of Exceptions in this cause."

And thereafter, and wiithin the time previously granted for that purpose, to-wit: on the 16th day of July, 1915, the Bill of Exceptions of defendant W. B. Hays was duly filed in the office of the clerk of the Circuit Court of Butler County, Missouri, as is shown by the endorsement thereon as follows, to-wit:

"Filed Jul. 16, 1915. Wm. McGuire, Circuit Clerk."

And said clerk by order of court also made a notation upon the records of the filing of said Bill of Exceptions, as is shown by the following record entry:

(Caption Omitted.)

"Now comes the defendant by his attorneys and leave of
14 court first had and obtained, files defendant's Bill of Exceptions in the above entitled cause, said Bill of Exceptions having been duly signed and sealed by the Hon. J. P. Foard, Judge of this Court, who tried said cause."

Which said Bill of Exceptions so filed in said cause, containing all the proceedings therein, is as follows, to-wit:

(Caption Omitted.)

"Be It Remembered, That on the 13th day of January, A. D. 1915, it being the — day of the regular January, 1915, Term of the Circuit Court within and for the County of Butler and State of Missouri, the above entitled cause coming on for hearing before the Honorable J. P. Foard, Judge of the Thirty-third Judicial Circuit of the State of Missouri, and Judge of the Circuit Court of Butler County, the following proceedings were had, to-wit:

And thereupon, this cause coming on to be heard, and the parties, plaintiff and defendant, by their respective counsel, having announced their readiness to proceed with the trial thereof, the plaintiff, to sustain the issues on its behalf, offered and introduced the following evidence:

Mr. Hill: If the court please, I first offer in evidence the
15 deposition of Frederick J. Warburton, taken on behalf of the plaintiff in this cause on October 15th, 1914, in the Borough of Manhattan, City, County and State of New York, at the office of John A. Morrison, Notary Public, on the 12th floor of No. 41 Park Row; the deposition reads as follows:

FREDERICK J. WARBURTON, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposed and said:

I am Secretary and Treasurer of the Mergenthaler Linotype Company, the plaintiff in this action, whose principal office is located at 154 Nassau Street, Borough of Manhattan, City of New York. About or prior to May 12th, 1910, the Mergenthaler Linotype Company, the plaintiff, leased a linotype machine to the defendants. The transaction was conducted on part of the plaintiff by its traveling salesman, William M. Nelis, at Poplar Bluff, Missouri. Witness stated that his first knowledge of the transaction was when the proposed order was received at the New York office from the Chicago office. Thereupon, a form of lease was prepared and forwarded from the New York office to the defendants at Poplar Bluff, Missouri for their execution. The defendants signed the lease at
16 Poplar Bluff on the 12th day of May, 1910, and the plaintiff signed it at the office of the plaintiff in New York on the 14th day of May, 1910. By the terms of the lease payments were required to be made in New York exchange at the office of the plaintiff in New York. Witness stated that the first payment of $632.50 called for under the lease was made in the following manner: $332.50 was sent to the plaintiff at New York on May 12th, 1910, by telegraphic order through the Western Union from Poplar Bluff, and the remainder was sent by two notes of the defendants. No payments were made in Missouri. The machine was delivered F. O. B. railroad, Brooklyn, New York. Witness stated that on the 12th day of May, 1910, and since that time, he was Secretary and Treasurer of the plaintiff. The plaintiff had no office for the transaction of business in Missouri at or about the 12th day of May, 1910, neither did it have a bank account in that state at or about that date; nor did it have any agent stationed in Missouri. None of the plaintiff company's products were made or stored in the State of Missouri at or about that date.

Witness stated that the plaintiff first opened an office for the transaction of business in Missouri on January 2nd, 1913; at which time it complied with the laws of Missouri relating to foreign cor-
17 porations. Prior to January 2nd, 1913, orders received from persons in Missouri were filled from Chicago or New York. If orders for machines, they were filled from New York; if for supplies, from either Chicago or New York. Goods so ordered were to be paid for at New York in the case of machines, and at either New York or Chicago in the case of supplies and they were so paid. The plaintiff's method of doing business with regard to obtaining orders for machines in the State of Missouri on or about May 12, 1910, was through a traveling saleman; all orders being subject to the

acceptance or rejection of the plaintiff at New York. During the period from May 12th, 1910, to January 2nd, 1913, no accounts for goods sold were made payable to plaintiff within the State of Missouri.

No further payments, in addition to the one mentioned, have been made by the defendants under the lease. Witness stated that there was now owing to the plaintiff by the defendants under the lease $2,632.35, made up as follows:

Rental due June 14, 1911, $632.50; rental due June 14, 1912, $632.50; rental due June 14, 1913, $632.50; rental due June 14, 1914, $632.50; with interest from the respective due dates;
18 and insurance premiums paid as follows: December 20, 1911, $28.17; August 21, 1912, $24.72; June 19, 1913, $24.73; June 14, 1914, $24.73, with interest from the date of the respective payments.

Mr. Hill: Now, Your Honor, I want next to introduce in evidence the lease marked "Exhibit A" and attached to the original petition filed in this case.

Mr. Ernest Green: We object, if the court please, to the introduction of it now, for the reason that the proper foundation for its introduction has not been laid.

The Court: Is that the lease?

Mr. Hill: I proved the signing of it by this deposition.

The Court: All right; objection overruled.

To which ruling of the court the defendant, by counsel, objected and excepted at the time.

Mr. Hill: The lease reads as follows, Your Honor.

Mr. Ernest Green: Why can't the court take that without having it read?

(Mr. Hill here read said lease into the record, a copy of said lease being in words and figures as follows:)

19 This Agreement, made and entered into this twelfth day of May, 1910, by and between Mergenthaler Linotype Company, a body corporate, organized and existing under the laws of the State of New York, hereinafter designated the lessor, of the first part, and William B. Hays and Samuel W. Davis, co-partners, of Poplar Bluff, Missouri, proprietors of the Citizen-Democrat, hereinafter designated the lessees, of the second part:

Witnesseth: That for and in consideration of the mutual covenants, obligations and considerations hereinafter contained, the respective parties hereto have agreed and do hereby agree together as follows:

First. The lessor agrees to deliver to the lessees on the terms and conditions hereinafter named: One (1) Two-letter Linotype Machine, Model 5, No. 14,088, and One Two-letter Duplex Equipment.

Second. The lessor agrees that said machine shall be in operative condition and capable of setting, when operated by an expert, at least 5,000 ems nonpareil per hour.

Third. The lessor agrees that after the receipt of the first
20 year's rental, as hereinafter provided, delivery of said machine, its belongings and accessories, shall be made to the lessees f. o. b. City of New York.

Fourth. The lessor agrees that it will, if so requested, furnish at the expense of said lessees, a competent machinist to erect said machine at the place of business of lessees, and a skilled operator to instruct the employees of the lessees in the use of the machine.

Fifth. The lessees agree to accept said machine, its belongings and accessories, at the factory of the lessor, Borough of Brooklyn, City of New York, and cause them to be at once transported to and erected in a safe and suitable location in their place of business, No. 220 South Fourth Street, Poplar Bluff, Missouri, and to pay the wages and expenses of machinists and operators, including the time and amounts necessarily spent by them in traveling, and all freights upon the machine, its belongings and accessories, from the City of New York to Poplar Bluff, Missouri, and to pay the lessor for said machine, its belongings and accessories, yearly and in advance, during the whole of the term herein provided for, the annual rental of
Six hundred thirty-two and 50/100 dollars ($632.50) (New
21 York Exchange); said rental for the first year to be due and payable as soon as the said mahine is ready for delivery and before delivery of same is made. The period, however, to which the first year's rental shall apply shall commence thirty days after the date at which said machine is ready for delivery; the object of said allowance of thirty days without rental being to give the lessees time in which to transport the said machine to, and to erect it in, their place of business aforesaid and to become familiar with its use.

Sixth. The lessees agree that should a promissory note or notes be at any time accepted by the lessor instead of cash or New York exchange for said rental or any part thereof, only payment of said note or notes shall be payment of said rental, and upon default in the payment of any of said notes, or upon the failure of the lessees to perform any other of the covenants, conditions or obligations of this agreement, or if the lessees shall become bankrupt or insolvent, or shall part with the machine without the consent of the lessor, either by their own act or by operation of the law, the lessor may at its option terminate this agreement by notice in writing, and take possession of and remove said machine, its belongings and accessories, and all moneys theretofore paid shall belong to the
22 lessor, and the lessees shall have no claim for the return of same or any part thereof.

Seventh. The lessees agree that they will maintain the said machine, its belongings and accessories, in good and operative condition, and to that end will cause the same to be cared for by a competent man and at their own expense at once replace and repair all such parts of said machine, its belongings and accessories, as may be broken, worn out or damaged; and that the said machine shall not be operated more than sixteen hours per day; and that they will allow the agents of the lessor access to said machine at all reasonable times, and that they will, whenever so requested, furnish to the lessor a

waiver of landlord's lien upon said machine, its belongings and accessories.

Eighth. The lessees agree that they will not remove the said machine, its belongings or accessories, or any part thereof, from their said place of business, without the consent in writing of the lessor, and that they will not assign, mortgage, transfer, underlet or part with the possession of the same, or any part thereof, or any interest therein, either directly or indirectly, and that they will not do or permit to be done anything whereby they or any part thereof
23 shall or may be seized, taken in execution, attached, removed, destroyed or injured.

Ninth. The lessees agree that they will pay, bear and discharge all taxes that may be charged, assessed or imposed upon the said machine, its belongings and accessories, or any part thereof, or any valuation thereof, during the term of this lease, and will pay to the said lessor, in addition to the rental hereby reserved, the cost of insuring said machine, its belongings and accessories, during the whole of the term herein provided, against loss or damage by fire to the amount of $1150.00 for the benefit of the lessor, the premium for such insurance, however, not to exceed the local ruling rate at Poplar Bluff, Missouri, and to be paid by the said lessee- to the said lessor upon demand.

Tenth. It is mutually understood and agreed that this lease is made for the term of six (6) years, but if the lessees shall desire to discontinue the use of said machine at the end of the first year, they shall have the right so to do, provided that they shall have given the lessor notice in writing to that effect thirty days before the expiration of the said first year, and provided further that they shall, at the end of said first year, have caused said machine,
24 its belongings and accessories, to be properly boxed and delivered f. o. b. at Poplar Bluff, Missouri addressed to the lessor, Borough of Brooklyn, City of New York, or as the lessor may direct, without charge or cost to the lessor, otherwise (unless the lessees shall have exercised the option of purchase hereinafter provided for) this lease shall continue in force and be binding upon both parties hereto to the end of the sixth year, subject to the annual payment by the lessees to the lessor of $632.50 at the beginning of each year, and to all the terms and conditions of this agreement, and at the end of said period of six years said machine, its belongings and accessories, shall be returned by the lessees to the lessor by delivery as above provided, without cost or charge to the lessor.

Eleventh. The lessees further agree that unless they shall have purchased the said machine from the lessor, or unless and until they shall have returned the same to the lessor in the manner hereinbefore provided, they will continue to pay to the lessor the annual rental of $632.50 at the beginning of each year, and all the covenants and obligations of the lessees under this agreement shall continue in full force and effect.

Twelfth. It is distinctly understood and agreed between
25 the parties hereto, that this instrument is not to be considered in any sense a bill of sale or evidence of a con-

ditional sale, and that the entire right, title and interest of every kind in and to the said machine, its belongings and accessories, is now, and is to remain in the lessor until the lessees shall have exercised the option of purchase and shall have fully completed the purchase as hereinafter provided.

Thirteenth. In case the lessees shall have paid said first year's rental in full as herein provided, and shall have paid the lessor for such repairs as it shall have made upon said machine and for such parts and supplies as it shall have furnished for its use, and shall have also performed all of the other covenants, conditions and obligations of this instrument by said lessees to be performed, and then only, said lessees shall have a right to purchase said machine, its belongings and accessories, from said lessor by the payment to the said lessor of the sum of Twenty-six hundred eighty-two and 50/100 dollars ($2682.50), but such right to purchase may be exercised by said lessees only in case said lessees shall, within eleven months from the date of the delivery of the machine as aforesaid, have given said lessor notice in writing of the intention of said lessees to
26 make said purchase, and in the event of such purchase and payment within thirteen months from the date of the delivery of the machine as aforesaid then, and not otherwise, the legal title to said property shall pass to said lessees and this lease shall cease and determine.

It is however, expressly agreed that the right of purchase hereinabove provided for shall not be exercised by any person or party other than the said lessees and that until the purchase and payment hereinabove provided for shall have been completed, made and performed, the entire right, title and interest of every kind in and to said property shall remain in said lessor, subject only to the right of said lessees to use said machine as lessees, and not as purchaser.

Fourteenth. The lessees shall, when thereunto requested by said Mergenthaler Linotype Company, forthwith execute and deliver to said Mergenthaler Linotype Company such new agreement, in form to be approved by said Mergenthaler Linotype Company, or such other statement, affidavit, instrument or assurance as may by said Mergenthaler Linotype Company be deemed proper or necessary to continue and protect its ownership and control of the property hereby leased.

27 Fifteenth. The lessor, by reason of its interest that said machine, its belongings and accessories, may remain in perfect condition and maintain their reputation, agrees that it will furnish and continue to furnish the lessees with any and all spacers, matrices, parts or other supplies required for use on or in connection with said machine, its belongings and accessories, at prices not exceeding its published list prices, and the said lessees agree that they will, during the existence of this agreement, purchase said spacers, matrices, parts or other supplies required for use on or in connection with said machine, its belongings and accessories, from the lessor or its agents, only.

Sixteenth. The lessor is authorized to enter in this lease the factory

number of the machine named herein after said lease has been executed.

In Testimony Whereof, this Agreement has been executed by the parties hereto.

MERGENTHALER LINOTYPE COMPANY,
By NORMAN DODGE,
Second Vice-President.

Attest:
[SEAL.] J. W. HEARD,
Assistant Secretary.

W. B. HAYS. [SEAL.]
SAMUEL W. DAVIS. [SEAL.]

28 Mr. Hill: I next desire to offer in evidence, Your Honor, the deposition of William M. Nelis, taken in Chicago on the eighth day of January, 1915, and filed in this court on the eleventh day of January, 1915—deposition was taken on behalf of the defendant W. B. Hays.

WILLIAM M. NELIS, of lawful age, being produced, sworn and examined on the part of the defendant W. B. Hays, deposes and saith:

My name is William M. Nelis, my present occupation is clerk in the Chicago agency. In May, 1910, I was employed as traveling man for the Mergenthaler Linotype Company, covering the states of Missouri, Iowa and Kansas. As a representative of the Mergenthaler Linotype Company, I made the preliminary contract in question in this case. I first called on Mr. Hays and Mr. Davis; we went over the proposition as to necessary equipment to meet their requirements, and I left a memorandum of cost and left town. Mr. Davis at the time was in Cape Girardeau. I returned sometime later. Mr. Davis and Mr. Hays apparently had completed their business arrangements. I saw Mr. Hays in Poplar Bluff; he signed up the preliminaries and I went to Cape Girardeau and Mr.
29 Davis signed up the preliminaries there. I mailed them to Chicago that night with my recommendation and went north that night to St. Louis. Witness stated he did not have the preliminary contract that was signed and did not know where it was. When witness first saw Messrs. Hays and Davis, there had been no agreement entered into between them, and witness did not know who was at that time in charge of the Citizen-Democrat. Witness could not state definitely, without referring to the records, when his first visit was made to Poplar Bluff. He did not have the records with him, as they were at the Chicago office. Witness stated that his recollection was that he made his first trip into Southern Missouri around 1905 or 1906. He had at that time eight states, and he tried to cover them all, hence could only get there possibly once a year, until his territory was later curtailed. His judgment was that prior to the sending in of the preliminaries, he had been there about

four or five times. Relative to this particular transaction witness stated that the first time he went to Poplar Bluff was possibly one month prior to the execution of the contract, and at that time he saw Messrs. Davis and Hays. Mr. Davis was at that time living in Cape Girardeau. Witness stated that Mr. Hays personally
30 executed the preliminary contract; which was done when witness came back after Hays had conferred with Mr. Davis; Davis advising the witness that in the meantime they had entered into a partnership, by which they were to operate the paper. Witness did not return until the machine was shipped, and consequently did not know whether Mr. Hays ever signed the final contract or not. Witness had no copy of the preliminary contract. He stated that when a preliminary contract was sent to New York for approval, it was not binding on either party until approved by the Mergenthaler Linotype Company, who received a copy of the preliminary contract as witness made same out in duplicate. Witness stated that he knew nothing relative to the custom about the execution of the final contract, and did not know how that was done. He stated that he dealt with Mr. Hays, as well as Mr. Davis, so far as the preliminary contract was concerned, and that Mr. Hays signed that as well as Mr. Davis. Witness was not in Poplar Bluff when the machine was installed, as his business was simply to solicit orders. As to taking orders for repairs, witness stated that only once in awhile when he would be in an office and his attention would be called to some little part by the operator, or if they had an order, would he take it.
31 This order he would put into an envelope and mail to Chicago. Witness stated that the parts needed would be shipped to the customer from the Chicago office, although he was not certain about that. Witness stated that he had nothing to do with the securing of the operator to instruct the lessee in the operation of the machine in this particular case, and in any case he never had to his knowledge. Witness stated that after the execution of this preliminary contract, the same was left open for the investigation of the solvency of the parties executing the preliminary contract, and also to get the approval of the special terms which were made necessary in this particular case. Witness stated he had no authority to modify the terms of the preliminary contract, but he would sometimes take the liberty of proposing certain terms to New York for its consideration. Witness stated he did not know where the machine in controversy now was; he had seen the machine since May, 1910; the last time being in the Democrat office in Poplar Bluff in the fall of 1912. At that time witness thought a man named Ferguson was the managing editor of the Citizen-Democrat. He did not think Ferguson ever claimed to be the owner of the paper. Witness had not been in Poplar Bluff since the plant was sold
32 out under mortgage, and knew nothing about how much had been paid under the lease.

On cross examination witness stated that when he spoke about the preliminary contract, he referred to the yellow blank that was introduced in evidence in the depositions taken in New York. Witness carried blanks with him for use when he took an order. When

he threshed out the terms and came to an arrangement, he would fill in one of those blanks. All of the orders which he took when he was traveling for the Mergenthaler Linotype Company were taken subject to the approval of the home office, and it is so stated in that yellow blank. When witness speaks of the preliminary contract, he means the order that was written up on this blank. Witness had no authority to bind the Mergenthaler Linotype Company in any way by contract, and that was the understanding between himself and Hays and the other lessee. They all understood that unless the New York office approved the order and prepared the contracts, that it was no go, and was all off. Witness had nothing whatever to do with reference to taking orders for supplies, and he could not recall that he ever took a supply order in Missouri. He did recall one
33 case of a man handing him an envelope, saying that there was an order in it; that he put a stamp on the envelope and mailed it to Chicago. Witness was just a traveling salesman, soliciting orders for machines in the states named by him. The order he forwarded to Chicago, and from thence it was forwarded to New York.

Mr. Hill: Let's see—where is the petition?

Mr. Hill. Mr. Green, will you admit that the amounts paid out for insurance premiums as specified in the petition did not exceed at any time the local ruling rate at Poplar Bluff, Mo.?

Mr. Ernest Green: Have you got any proof that you paid this? We will admit that they don't exceed the local ruling rate but I didn't hear any testimony to the effect that you had paid it.

Mr. Hill: It is in there—I just read it.

Mr. Hill: I again offer "Exhibit A." (Which said offering is fully set forth herein at page 11.)

Mr. Ernest Green: We make the same objection; the same objection as before.

The Court: Overruled.

To which ruling of the court the defendants, by counsel, objected and excepted at the time.

Mr. Hill: That's all. Your Honor; plaintiff rests.

The plaintiff here rested its case in chief.

34 The defendant W. B. Hays here offered and requested the court to give a declaration of law in the nature of a demurrer to the plaintiff's testimony, a copy of said declaration of law being in words and figures as follows:

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS et al., Defendants.

1.

Now at the close of the evidence introduced by the plaintiff, the court declares the law to be that under the law and the testimony in-

troduced herein by the plaintiff, that the finding of the court must be for the defendant, W. B. Hays.

Which said declaration of law the court failed and refused to give; and to the action of the court in so failing and refusing to give said declaration of law, the defendant, by counsel, objected and excepted at the time.

Mr. Ernest Green: Now, if the court please, I first desire to offer in evidence the deposition of Frederick J. Warburton taken in the City of New York on the 28th day of December, 1914.

(In order that the court may fully and clearly understand the testimony of the witnesses who testified as to the vital points in issue in this case, we have set the same out in hace verba.)

35 FREDERICK J. WARBURTON, of lawful age, being produced, sworn and examined on the part of the defendant, W. B. Hays, deposeth and saith:

Direct examination.

By Mr. Kohn:

Q. What is your full name?
A. Frederick J. Warburton.
Q. You are the treasurer of the Mergenthaler Linotype Company, the plaintiff in this action?
A. Yes.
Q. Do you hold any other office?
A. Secretary.
Q. Where do you reside?
A. Scarsdale, New York.
Q. You are familiar with the issues in this action, Mr. Warburton?
A. Yes.
Q. Have you prepared a list of contracts between the Mergenthaler Linotype Company and its customers in the State of Missouri, between January 1st, and May 12, 1910?
A. Yes; for the lease of machines.
Q. Are those contracts in all substantial respects similar to the contract involved in this suit?
A. Yes.

36 Q. Will you be kind enough to tell me the dates, names of the parties, amount and place, of all the lease contracts between the Mergenthaler Linotype Company and its customers similar to the contract in suit here, in Missouri, between January 1, 1910, and May 12, 1910?

A. Punton Clark Printing Company, Kansas City, Missouri, dated January 22, 1910, for one two-letter linotype machine, Model 5, Number 13770, and two two-letter duplex equipments, annual rental $715, running six years.

Columbia Herald Newspaper Company, Columbia, Missouri, dated January 28, 1910, for one two-letter linotype machine, Model 5, No.

13626, and one two-letter duplex attachment, for six years at the annual rental of $632.50.

Dunklin County Publishing Company, Kennett, Missouri, dated January 31, 1910, for one two-letter linotype machine, Model 5, No. 13629, and one two-letter duplex attachment, for six years at the annual rental of $632.50.

Frederick E. Kies and John G. Kies, of Jackson, Missouri, dated March 10, 1910, for one two-letter linotype machine Model 5, No. 13896, and two two letter duplex equipments, for six years at the annual rental of $715.

37 Special Linotyping Company, Kansas City, Missouri, March 19, 1910, of one two-letter linotype machine, Model 5, No. 13916, for six years at the annual rental of $550.

The Pulitzer Publishing Company, St. Louis, Missouri, March 19, 1910, six two-letter linotype machines, Model 4, Nos. 13730, 14048, 14042, 14054 and 14055 for six years, at the annual rental of $4,350.

St. Louis Christian Advocate Company, St. Louis, Missouri, dated March 21, 1910, one two-letter linotype machine, Model 5, No. 13908, and one two-letter duplex equipment, for six years at the annual rental of $632.50.

Concordia Publishing House, St. Louis, Missouri, March 23, 1910, one two-letter linotype machine, Model 2, No. 13534, for six years at the annual rental of $725.

Macon Publishing Company, Macon, Missouri, April 18, 1910, one two-letter linotype machine, Model 5, No. 14008, and one two letter duplex equipment, for six years at the annual rental of $632.50.

National Newspaper Association, Kansas City, Missouri, April 18, 1910, four two-letter linotype machines, Model 4, No. 13682
38 and Model 5, Nos. 13981, 13982 and 13983, for six years at the annual rental of $2,375.

The Special Linotyping Company, Kansas City, Missouri, May 7, 1910, one two-letter linotype machine, Model 4, No. 14058 for six years at the annual rental of $725; and the contract in question.

Q. All of the contracts which you have testified to were made on the printed forms were they not?

A. Yes.

Q. And they are all exactly like the contract in this suit, except for the date, the parties, model of the machine, rental and option, are they not?

A. Yes.

Q. Were all of these contracts solicited by your company?

A. They were solicited by our representative, Mr. William M. Nelis.

Q. Where does Mr. Nelis live?

A. In Chicago.

Q. Is he in the employ of your company now?

A. Yes.

Q. Was it his duty to cover the entire State of Missouri during this period?

A. Yes, sir.

Q. Did he cover any other territory?

39 A. I think not; but he might have been designated by the Chicago agent to go elsewhere.

Q. Did you have any other representative covering the State of Missouri or any part of it during this period?

A. Not to my knowledge.

Q. You would be likely to know of it, wouldn't you, Mr. Warburton?

A. Yes.

Q. When you wanted to communicate with Mr. Nelis where did you address him?

A. I would address him through the Chicago agency at Chicago, Illinois.

Q. Did he have any address in Missouri at any time where you could reach him?

A. No.

Q. Did he report directly to you or to the Chicago office as to what he was doing?

A. To the Chicago office.

Q. Now, what was the procedure, as far as obtaining these contracts was concerned?

A. Mr. Nelis visited the offices where he desired to place linotype machines and when he had obtained an order he had a form signed by the customer and himself, subject to the acceptance, as

40 stated upon the document itself, of the officers of the company at New York.

Q. Have you got one of those forms?

A. Yes.

Q. Can you let us have one of those forms to attach to this deposition?

A. Yes.—(Here the witness produces a yellow paper which was received and marked in evidence, "Exhibit A.") This order Mr. Nelis sent to Chicago and Chicago forwarded it to New York with the information that he was able to obtain or they were able to obtain, as to the responsibility of the party, etc. That then was reviewed here in New York by myself; I determined whether or not the order would be accepted upon the terms, etc. The acceptance was written upon this form, usually by the second vice-president and the assistant-secretary, after I had myself approved it; that preliminary form, as we call it, was then sent direct to the customer showing that we had accepted his order—mailed from New York to the customer in Missouri. The machine was then put under way, the building of it; when it was approaching completion, report was made to the New York office from our factory; the final paper, in the form of the leases that I have testified about in detail, was then forwarded to the customer or customers; they signed

41 that and returned it here executed by themselves; that being examined and found to be correct, it was signed by the officers of the company here and then sent to the customer and the shipment made.

Q. Are you sure that these preliminary contracts were sent by you

directly to the parties in Missouri, or were they sent by you to your Chicago office and then forwarded?

A. They were sent to the customer direct from the New York office.

Q. But the original contract with the clause on it that it was subject to approval by the New York office, was signed in Missouri, in each instance?

A. It was so signed in each instance.

Q. Signed both by the purchaser or the lessee and Mr. Nelis on behalf of your company?

A. Yes.

Q. Is the paper I now show you a form of the preliminary contract you have testified about (handing witness yellow paper marked "Exhibit A")?

A. Yes.

42 Q. Have you a form of acceptance of this preliminary contract that was sent to the customer from the home office?

A. It is at the foot of that paper, "Exhibit A."

Q. So these were sent to you in duplicate signed both by the customer and by Mr. Nelis on your behalf?

A. Yes.

Q. And then if accepted, one was returned executed by the proper officers of the company?

A. Yes; and the other, also signed, retained at this office.

Q. Who was the head of your Chicago office during 1910?

A. George E. Lincoln.

Q. Is he an officer of the company?

A. No.

Q. Did he have power to make contracts?

A. No.

Q. Is he still at the head of the Chicago office?

A. Yes.

Q. Where is his office?

A. 1100 South Wabash Avenue, Chicago, Illinois.

43 Q. Can you tell me approximately for how long a period you had been leasing or selling linotype machines in the State of Missouri prior to May 12, 1910?

A. From the beginning of this company's business, which was December, 1895.

Q. Can you tell me approximately how many machines were leased in the State of Missouri from that time until January 1st, 1910?

A. We leased about 300 machines during that entire period—distributed over said entire period.

Q. Were all the machines that you have just testified about, leased in substantially the same manner as the specific instances you have spoken of in the year 1910?

A. Yes.

Q. And during all that period you had a solicitor covering that state and soliciting business?

A. Yes.

Q. These contracts that you have testified about, provide that

you are to furnish a machinist to erect those machines at the instance of the lessee?

A. Yes; if he so requests.

Q. Was it usual for the lessee to request such a machinist?

44 A. Well, sometimes they sent their machinist on here to our factory and we gave him the instructions that were necessary and he made the erection himself; in many cases one of our machinists erected the machines, and in many others the customer had the work done by a machinist not in our employ.

Q. Now, this machinist that you sent out was in your employ, obtaining a salary from you?

A. Yes.

Q. You were reimbursed directly by the lessee for whatever it cost you?

A. No; I wouldn't say that; I think in most cases, now that I recall, the machinist was paid directly by the customer.

Q. Well, he was in your employ?

A. Yes.

Q. And if he hadn't been sent out there he would have been doing something else for you?

A. I suppose so.

Q. So that at all times he was in your employ?

A. Yes.

Q. These contracts also call for you to provide an operator to instruct the lessee as to how to operate the machine?

45 A. Yes.

Q. Were those operators also in your employ?

A. I can hardly think of a case where we furnished an operator. I might say the custom was for a man to come on here for instruction, unless the customer had already arranged for a competent man.

Q. These contracts provide that in case of default you may retake possession of the machine?

A. Yes.

Q. Did you ever enforce that provision?

A. I suppose we have—I don't recall a case at the moment.

Q. Well, in the instances where you did, who attended to it for you?

A. We engaged an attorney to do it.

Q. From the New York office?

A. No; in the state.

Q. Who engaged the attorney?

A. We would from the New York office.

Q. Engage an attorney in Missouri to handle it for you and take whatever legal steps were necessary to regain the machine?

A. Yes, under our directions.

Q. It was your custom, where you did take machines back,

46 whether it was in Missouri or in any other state, to employ counsel to attend to it?

A. Yes; there have been cases where there have been reasons for taking machines back, where we have sent somebody from New York

to do it, as for instance, Mr. Mackey, my assistant, who has on occasions gone out and attended to matters of that kind.

Q. The contracts also call for the lessees to keep the machines in repair and provide that you are to furnish, at the instance of the lessee, what ever parts or replacements may be necessary for that purpose?

A. Yes.

Q. I suppose it was quite usual for parts to be required and little things to be replaced?

—. ——.

Q. Where do those parts come from?

A. For Missouri they would usually come from the Chicago office; they might come from the New York office, but would come from either one or the other.

Q. Is there no place anywhere in the State of Missouri where you have either belonging to you or accessible to you, any supply of parts whatever?

A. There was not up to the year January 1, 1913.

47 Q. So that if a consumer wanted a part he would have to wait until he could get it from Chicago?

A. Yes.

Q. Your company itself paid the fire insurance on all machines that it leased, didn't it?

A. Yes; we paid the insurance direct and charged it to the customer, as the lease provides, if the customer failed to provide for it.

Q. And in the State of Missouri who placed these fire insurance policies for you?

A. The insurance was placed through the German-American Insurance Company of New York, but the actual writing of the policies was done by that company's agents in the State of Missouri.

Q. So you gave the order to the New York office and the policies were then written by the Missouri agent of the insurance company and returned to you here in New York?

A. Yes. In the case of leased machines, the order was given to place the insurance; then bills were rendered for the premiums to the respective customers in the State of Missouri; in many of those cases the customer remitted direct to our insurance agents,

48 who were Owens and Phillips, and Owens & Phillips in turn paid the insurance company. In those cases, however, where our customer failed to pay the premium we advanced the amount but charged it to their accounts.

Q. It was your custom, was it not, to record all leases in the county where the machines happened to be?

A. Yes.

Q. Have you ever received directly any tax bill from the State of Missouri on any of these machines?

A. I don't recall it.

Q. So that the taxes were all taken care of directly by the customer?

A. I suppose so.

Q. You at all times retained title to all the machines that you

have testified about, until the customer actually purchased them, didn't you?

A. Yes.

Q. And how many machines did you have on lease in the State of Missouri on May 12, 1910?

A. 45.

Q. Did you have any office in the State of Missouri prior to May 12, 1910?

A. No.

49 Q. Did you have any place in the State of Missouri that bore the name of the Mergenthaler Linotype Company on it in any form?

A. No.

Q. Did you ever have any letterheads of your company with any place in Missouri printed on it?

A. No.

Q. Sure there was no office in St. Louis of any kind?

A. I am quite sure.

Q. Did your company have any bank account anywhere in Missouri prior to May 12, 1910?

A. No.

Q. Since January 1, 1913, I understand you have opened an agency in Missouri and are now licensed to do business there, is that correct?

A. Yes.

Q. But prior to that had you any representative of any kind in that State, except solicitors?

A. No.

Q. Do you now keep a stock of parts in Missouri?

A. Yes.

Q. Ever since you opened your agency?

A. Yes; we call it a supply house.

50 Q. Did your company have any property of any kind in the State of Missouri prior to May 12, 1910, other than the machines on lease?

A. No.

Cross-examination.

By Mr. Morrison:

Q. Mr. Warburton, you have testified as to the custom of forwarding the memoranda of agreement in the form of "Exhibit A," received by the solicitors on prospective customers in the State of Missouri prior to May 12, 1910, and the manner in which they were handled by the New York office. Can you testify if the same procedure was carried out in the case of Hays and Davis?

A. Yes, it was.

Q. Can you tell me the date when the acceptance of the memorandum agreement was sent from the New York office to your company to Messrs. Hays and Davis?

A. Yes, March 31, 1910.

Q. Was such acceptance sent directly from the New York office to Messrs. Hays and Davis?

A. Yes.

51 Redirect examination.

By Mr. Kohn:

Q. What was the occasion, Mr. Warburton, of any further contract other than this memorandum of agreement, after it had been accepted?

A. The final lease is more elaborate in its terms *that* that is—that is a sort of condensation of the things we put into the lease.

Q. Are you quite sure that the final lease was always signed by the customer before it was signed by your company?

A. Yes.

Q. Positive about it?

A. Always, quite positive.

Q. In the course of events, I assume that it is necessary to have repairs made to these machines which the customers are not able to make themselves, is that correct?

A. It would depend upon the man in charge of the machine.

Q. Well, there have been circumstances when there were repairs required, which the customer was not able to make, and in those instances did you, when requested, send your mechanics to Missouri to help them with repairs?

52 A. I cannot recall a case but that would be the natural course.

Q. When these leases expire, and the machines come back to you, how do you get them; do you send somebody out to take them?

A. The contract specifies in the tenth clause that the lessee shall box and ship the machine addressed to us, as we may direct.

Q. What is the custom about that, get them back to New York?

A. Machines are very seldom returned. The option to purchase is almost universally exercised.

Q. But there have been instances, have there not, where they paid rent for the full six years and then turned the machine back?

A. Yes.

Q. Have you in those instances brought them back to New York or sold them for the best you could get for them?

A. No, we have them sent back.

Q. You must have some on your hands or do you sell them second hand?

A. Sometimes, but before sending them out again we rebuild them.

Q. You say you always bring them back to the home office before you sell them?

53 A. Yes, I should say that is so. Where a machine was in such bad shape that it wasn't worth bringing back, we would have it sent to a nearer agency or perhaps used in a school or something of that kind.

Q. These contracts also provide for access by your agents to these machines at all times?

A. Yes.

Q. Have you ever taken advantage of that provision?

A. Yes.

Q. What is the purpose of that provision?

A. We have inspectors who travel through the country to look at the machines, see that they are in order, give advice to the operators.

Q. That is a regular part of your business to see that machines are kept up to the standard?

A. We make no agreement to do any work ourselves but it is our custom to have inspectors go around the country to see how the machines are being treated, whether they are kept clean, whether they need repair and to give suggestions to the people who use them.

Q. Who was the inspector who covered the State of Missouri?

A. I could not tell you.

54 Q. How many of such inspectors *had* the company got in its employ?

A. I should say about eighteen.

Q. And these inspectors cover the entire territory in which you sell machines in the United States?

A. Yes.

Q. About how often do you inspect a machine?

A. There is no rule.

Q. More than once a year?

A. I cannot answer with certainty but probably at least once a year.

Q. Do you make any effort to see that the taxes are paid on all these machines?

A. If I have notice that a tax has been imposed, I would refer the matter to the customer and call his attention to the fact that his contract provided that he should pay the taxes.

Q. I mean do you actually keep track to see that he is paying the taxes?

A. No; we have had no trouble in that regard.

Q. In addition to the machines leased by you did your company make any direct sales of machines in Missouri during the period from December, 1895, to May 12, 1910?

55 A. Yes.

Q. About how many?

A. Ten were sold for cash and one hundred were sold for part cash and part mortgage.

Q. How many of these machines were sold between January 1st, 1910, and May 12, 1910?

A. Three.

Q. What was the method of selling these machines?

A. Our solicitor obtained orders from customers and a preliminary form of contract of sale was signed in Missouri by him on behalf of our company and by the customer, subject, however, to acceptance by the officers of the company at New York, where, if approved by the proper officers of the company, one copy duly signed by them was returned directly to the customer.

Q. Will you produce one of these temporary contracts of sale that you have testified about?

A. Yes. (Witness produces two papers which were received in evidence and marked "Exhibit B" and Exhibit C".)

Q. What was the average selling price of the machines leased and sold by you in the State of Missouri?

A. About $3100. each.

56 Mr. Ernest Green: Now I desire to offer in evidence the deposition of George Lincoln, taken in the City of Chicago on the eighth day of January, 1915, before M. W. Borders, Notary Public, at the law offices of Borders, Walter & Burchmore, Rookery Building; and filed in this court on the eleventh day of January, 1915. (Mr. Green here read in evidence the deposition referred to, a copy of said deposition being in words and figures as follows:)

Direct examination.

By Mr. Green:

GEORGE E. LINCOLN, of lawful age, being produced, sworn and examined on the part of the defendant, W. B. Hays, deposes and saith:

Q. Give your full name and occupation?

A. George E. Lincoln, manager of the Chicago Agency of the Mergenthaler Linotype Company.

Q. As manager of the Chicago Agency of the Mergenthaler Linotype Company, have you charge of the business transacted by this company throughout the State of Illinois?

A. Yes.

57 Q. Were you in charge of the business transacted by this company throughout the state of Missouri prior to January, 1913?

A. Yes.

Q. In other words the business transacted by this company in the state of Missouri was managed through you as the manager of the Chicago office?

A. Yes.

Q. How long have you been manager of this office?

A. Since 1902.

Q. Your answer, then, to the previous question covers a period of from 1902 to 1913?

A. Yes; as duties of manager of the Chicago Agency.

Q. Did you have anything to do directly with the execution of the contract of lease suit in this case between the plaintiff and the defendants W. B. Hays and Samuel W. Davis?

A. No.

Q. Do you know anything about that transaction?

A. There was nothing special at the time it went through the office the same as any other agreement.

58 Q. Will you relate the circumstances surrounding this transaction as you recall them at this time?

A. I do not remember anything directly connected with this one case. I have no recollection of it outside of our records.

Q. Have you with you a record concerning this particular transaction?

A. We have a record in the office, where we make a record of the equipment of the machine, the date the order came in, and of its equipment.

Q. Do you know how many contracts you had in force in the state of Missouri at the time of the execution of this one?

A. No, sir.

Q. The data and information concerning that matter is in the New York office?

A. Entirely.

Q. How were these contracts of lease made in Missouri prior to January, 1913?

A. Well, our traveling salesman would send in a preliminary order, then we would make a record of its equipment, and send the preliminary order direct to New York City. There they make out the contracts. We have nothng whatever to do with it after that.

59 Q. Now, the preliminary contract that you refer to is an order whereby the Mergenthaler Linotype Company agrees to lease these machines to the person described as lessee for a specific rental, and is made by the traveling salesman; that preliminary order is sent in by the traveling salesman to this office, and this office forwards it to the New York for acceptance. Now, then, the New York office signs and accepts this preliminary contract and sends the contract of lease to the Missouri party making the lease. Is that correct?

A. Yes, sir.

Q. At the time this contract of lease is mailed out by the New York office, is it executed by the New York office or is it executed later?

A. By the New York office.

Q. It is executed at the time it is mailed out and then is signed by the Missouri party in Missouri?

A. No; I think I am wrong in that. They send the contract in duplicate to the purchaser and the purchaser signs them and returns them both to the New York office the New York office then executes them both and returns one of them to the customer for his files.

60 Q. Who is your traveling salesman traveling in Missouri in May, 1910?

A. Wm. M. Nelis.

Q. He was the representative of the Mergenthaler Linotype Co., who secured these contracts in the State of Missouri?

A. Yes, sir.

Q. Was there any other representative covering the state of Missouri at that time?

A. No, sir.

Q. Did Mr. Nelis have any address in the state of Missouri where you could reach him by correspondence during that time?

A. No; only daily.

Q. In other words he would forward you his address stating where

he would be each day, but he did not have any headquarters in Missouri?

A. None whatever.

Q. Did you have power, Mr. Lincoln, in 1910, during the period that you were in charge of the Chicago office, to make and execute contracts on the part of the Mergenthaler Linotype Company?

A. No, sir.

Q. Did Mr. Nelis have the authority to bind the Mergenthaler Linotype Company by contracts?

A. No, sir.

61 Q. The preliminary contract that he executed then was not binding upon the Mergenthaler Linotype Company until approved by the New York office?

A. That is correct.

Q. Can you tell me the length of time that this corporation had been engaged in leasing machines in Missouri prior to May, 1910?

A. I do not know.

Q. Do you know approximately how many machines the Mergenthaler Linotype Company had leased in the state of Missouri prior to May, 1910?

A. No. I have a partial list, but I do not know whether it was a complete list.

Q. Can you tell me the approximate number of machines that were leased from that time until May, 1910?

A. From 1902 to April, 1910, we had 235 rentals, 72 sales, making 307; 70 of these orders were not accepted by the New York office, or otherwise were not shipped.

Q. Now, these contracts that were made provided that the Mergenthaler Linotype Company would furnish a machinist to install these machines. Did you do that in these cases?

62 A. Where they requested we either got a local machinist or furnished one of our traveling machinists to go there.

Q. Did you have any machinist making his headquarters in the state of Missouri?

A. No, sir.

Q. Did you have any traveling in Missouri?

A. Not regularly, we would send a machinist to all different points in the territory.

Q. Who paid these machinists?

A. We did.

Q. Were they on a regular salary?

A. Yes; they were on a regular salary.

Q. Do you know whether you sent a machinist to install this one or not?

A. Not to my recollection.

Q. The contracts also provide that the Mergenthaler Linotype Company agrees to provide an operator to instruct the lessee how to operate the machine. Did you furnish such an operator in cases in Missouri?

A. I do not recall any case that we furnished an operator.

Q. Now, then, the contracts provide that in the event of default

of payment of the amount that you are entitled to take the machines back. Did you have cause at any time to take any of these
63 machines back?

A. That I do not know.

Q. Did you ever sell any of them in the state of Missouri that you did take back?

A. I do not know.

Q. The contracts also provide that you would pay the premiums on the machines. Did you pay those premiums?

A. I do not know. The New York office handles that.

Q. Did you ever pay any taxes in Missouri on these machines?

A. I would not know it if they did; handled through New York.

Q. The title at all times to these machines was retained by the Mergenthaler Linotype Company?

A. That is what I understand.

Q. When was the first time you had an office in the state of Missouri?

A. January, 1913.

Q. Where was it located?

A. 600 Delaware Street, Kansas City.

Q. You had no office in St. Louis?

A. No.

64 Q. Did you ever have a supply house in Missouri where you kept supplies for these machines previous to that date?

A. No.

Q. What was the method of supplying parts for machines prior to the opening of this office? Your contract provides that you can deliver parts for these machines.

A. They would send their orders for supplies to Chicago, and in some cases they sent them to New York. They would be filled from either place.

Q. You have no specific recollection of any transaction concerning this particular contract of lease?

A. No, sir.

Q. Now, then, the contract also provides that if it becomes necessary to make repairs to these machines that you will furnish a competent man to make these repairs. Did you do that in the case of the Missouri contracts?

A. We do when asked to.

Q. Now, you also had inspectors who went around and inspected these machines in the hands of lessees? Were those inspectors located?

65 A. They had no headquarters outside of Chicago.

Q. What jurisdiction did the Chicago Agency have in the United States?

A. Fifteen states.

Q. Where are different agencies located?

A. One in Kansas City and one in Cincinnati—both branches of the Chicago Agency. The Chicago Agency has exclusive jurisdiction over the Missouri business. The Kansas City office is subordinate to the Chicago Agency.

Q. Since the institution of this suit your company took out a license to transact business in the state of Missouri?

A. Yes.

Q. Do you know what was the cause of its doing that?

(Attorney Wilson objects to that question.)

A. We did it to conform to the laws of Missouri.

Q. You did it after the necessary papers were filed by the defendant in this case stating that this corporation had not complied with the laws of the state of Missouri?

(Same objection made to that remark by Mr. Wilson.)

66 A. This branch and supply house was not started in Kansas City until 1913. Before I started the supply house I wrote to the Secretary of State and asked him what the rules or customs in such cases were, and he sent us a blank to be filled out. This blank was sent on to New York and executed there.

Q. What is the capital stock of the Mergenthaler Linotype Company?

A. I understand that it is authorized at $15,000,000.

Q. Do you know what is the value of the machines which your company has in the state of Missouri at the present time?

A. No, sir.

Q. How many machines have you there at this time to which the Mergenthaler Linotype Company retain title?

A. I do not know.

Q. Do you know how many you had in May, 1910?

A. No, sir.

Q. What is the value of each machine?

A. Well, we have machines of various values, but the average value would be in the neighborhood of $3000.

67 Q. Then you estimate that you have made 420 contracts during the time of the establishment of this agency until May, 1910, and which would approximate about $600,000?

A. Some of the machines are lower prices, then some of them may have been taken out since that time.

Q. What is the number of machines leased in that territory?

A. We had 235 rental orders sent to New York, but some of those were cancelled and never shipped. Just what proportion of the rentals was not shipped I do not know, but the average value of a machine would be $3000.

Q. The particular contract in this case provides for an annual rental of $632.50. What is the selling price of that machine to one leasing in May, 1910?

A. That would be a machine with duplex attachment. The rental would be $632.50 on that class of machine, that is a machine equipped with a duplex equipment.

Q. The amount fixed in that contract was $2682.50 as the selling price?

A. That was the selling price at the end of the first year.

68 Q. What was the selling price if you had made a straight sale at the time of the execution of the contract instead of a lease?

A. It would have been $3315.

Cross-examination.

By Mr. Wilson:

Q. In all these cases, Mr. Lincoln, contracts which were made for machines to be placed in Missouri, I understand you to say, were, so far as the Mergenthaler Linotype Company are concerned, all executed at the home office in the state of New York?

A. Every one of them.

Q. And the goods, machines were all shipped from New York, were they not?

A. From the New York factory.

Q. You had no office at all in Missouri?

A. None.

Q. Never had up to 1913?

A. No, sir.

Q. That is only a depot for supplies, I understand?

A. Yes, sir.

69 Q. So that all orders for supplies of any kind in Missouri were filled either from Chicago or New York, as I understand?

A. Yes, sir.

Q. Payable in Chicago, were they?

A. Those purchased in Chicago were payable in Chicago and those purchased from New York were payable in New York.

And thereupon, the court took a recess until one o'clock p. m. of the same day, (to-wit, the 13th day of January, 1915), at which time, the parties and their respective counsel being present the same as heretofore, court was duly reconvened, and the following further proceedings in this cause were had:

Mr. Green: Now I next desire to offer in evidence, if the court please, the deposition of Walter C. Bleloch, taken at the same place and on the same day as the deposition of George E. Lincoln just heretofore read, under the same stipulation, etc. The deposition reads as follows:

(Mr. Green here read to the court, in evidence the deposition referred to, a copy of said deposition being in words and figures as follows:)

70 Direct examination.

By Mr. Green:

WALTER C. BLELOCH, of lawful age, being produced, sworn and examined on the part of the defendant, W. B. Hays, deposes and saith:

Q. Give your full name and occupation?

A. Walter C. Bleloch, sales manager of the Chicago Agency of the Mergenthaler Linotype Co., residence, Chicago.

Q. As sales manager did you have charge of the sale contracts entered into in May, 1910, between the Mergenthaler Linotype Company and Hays and Davis defendants in this case?

A. The preliminary papers all passed through my hands.

Q. The preliminary contract was made through Mr. Nelis?

A. Yes, sir.

Q. Forwarded by him to your office?

A. Yes.

Q. And went through your hands?

A. Yes.

Q. What do you do with a preliminary contract?

71 A. Our custom is to take those contracts and send them down to New York office, with a letter stating just what the equipment of the machine is, whether it is a rental or a sale proposition, the amount involved, and any special references that are in the agreements regarding the matter of terms or division of payments. Anything of that kind is outlined in this letter and with it goes the recommendations of the Chicago Agency as to whether it should be accepted. Any information that we may have regarding the financial responsibility of the office also goes with it.

Q. Do you recall the nature of the correspondence that took place between your office and the New York office relative to this particular sale?

A. I recall our letter.

Q. Have you a copy of your letter with you?

A. No.

Q. Can you relate the contents of this letter from memory?

A. It was a letter along the lines that I have just described; the first year's rental was divided into a cash payment of $532.50, and then there were two notes for $150 each representing the other $300, making the first year's rental of $632.50. Those notes fell due in three and six months, I believe.

72 Q. Was the preliminary contract accompanied by a cash payment?

A. No. As I recall it, I think that was sent in with the final lease.

Q. Did the two notes accompany the preliminary contract?

A. No. We do not make those out. New York would send those to the customer with the final lease.

Q. You never did see the notes?

A. No.

Q. You do not know whether they were signed by Mr. Hays personally or not?

A. I could not say that.

Q. Was the preliminary contract forwarded to you signed by Mr. Hays personally, or was it signed by Davis as a partnership?

A. Hays and Davis individually.

Q. And you forwarded that to New York with the recommendation that it be accepted?

A. Well, yes; I guess that is about what it amounted to. We go over all our "dope" and send it to New York.

Q. Do you as sales manager have charge of the sale of parts?

A. No; I have nothing to do with the parts.

73 Q. How do you do under this clause of the contract, providing that when this machine is originally installed that you agree to pay the wages and expenses of machinists and operators to install the machine, where do you send those machinists and operators from?

A. It depends on where they are at. The machinists' headquarters are here at the Chicago office. All of their work is sent out from here, but if we have no man putting up a machine in, say, Richland, Mo., or any other town in that section, Farmington, or somewhere down there, and we had a machine to erect in Poplar Bluff, we would naturally try to use that man who was at Farmington to do the work in order to save the additional time and expense of a man making a special trip from Chicago.

Q. Do you know whether you sent a man to install this particular machine?

A. I have a very distinct recollection of having a man in Missouri at the time.

Q. He went there and installed this machine?

A. He did not install it. We had a man in Missouri at the time, I am quite sure.

Q. But you did not have him install this machine?

74 A. No.

Q. You do not know who erected it then?

A. No.

Q. Who instructed the operator in the use of it?

A. I do not know.

Q. How long have you been connected with the Merganthaler Linotype Co.?

A. Since Jan. 1, 1902—the beginning of this office.

Q. The machinists that you send out to install these machines are in the employ of the Mergenthaler Linotype Company?

A. Yes, sir.

Q. Do they receive a salary from the Mergenthaler Linotype Company?

A. Yes, sir.

Q. Now, the contract also provides that if requested that you send an operator to instruct the lessee as to how to operate the same. Were those operators in the employ of the Mergenthaler Linotype Company?

A. Yes; we have some who are capable of erecting machines and also of operating them.

Q. They are on a regular fixed salary?

A. Regular salary basis.

75 Q. Whether they are engaged in that work or not?

A. Yes.

Q. Do you know anything about the payment of taxes in the state of Missouri on these machines?

A. Do not know anything about that.

Q. During the time you have been connected with the Chicago office there were approximately, up to May, 1910, 377 contracts in force in the state of Missouri?

A. As I understand it that is the number that went down to the New York office through the Chicago Agency during that time. There may have been a good many in force prior to the time we opened up.

Q. What you mean is that the contracts were made through the Chicago Agency and you do not know how many had been made prior to that time?

A. Yes, sir.

Q. And the average value of each one of these machines was $3000?

A. Approximately.

Q. These contracts or leases that were made, was anything done by way of recording them?

A. Not by us, no. The matter of recording was taken up by the New York office.

76 Q. These contracts or leases provide that at the end of the first year the lessees have the right to purchase the machine by paying $2,682.50, provided the first year's rent has been paid. After the expiration of that first year, does the Mergenthaler Linotype Company give the lessees any right to purchase the machine?

Objection raised by Mr. Wilson. The contract of lease is the best evidence; I object to the question.

A. I did not know whether or not I had the idea you were trying to convey. This lease gives the buyer the privilege of purchasing at the end of the first year. If he elects to purchase it he purchases it at that price that is mentioned in there. If he does not purchase he continues to rent for five more years as provided for in the lease.

Q. But if he does not elect to purchase it at the end of the first year, the right to purchase is forfeited, and he has to continue along?

A. Yes, sir; for five years.

Q. At the end of the five years the Mergenthaler Linotype Company takes the machine back?

A. At the end of the sixth year of the lease.

Q. They are not returned any part of the rent paid?

77 A. No; the lease outlines all of that.

Q. In other words, the man pays more for the use of the machine than if he had purchased it?

A. Yes.

Cross-examination.

By Mr. Wilson:

Q. Were you requested by the lessees to furnish a machinist to set up this machine?

A. No, sir.

Q. That is why you did not set it up?
A. Yes, sir.
Q. Now, these traveling salesmen took these preliminary agreements or orders, you call them?
A. Yes.
Q. And they were all forwarded to you by him from Missouri?
A. Yes.
Q. As I understand it, if you have anything to say in reference to the trade you write a letter, stating it in that letter, and forward these preliminary orders or agreements to New York?
A. Yes, sir.
Q. The orders, as I understand it, were all taken subject to the approval of the home office?
A. That is right.
78 Q. And you have no authority to bind the company?
A. None whatever.
Q. Now, if the New York office approved the order or preliminary agreements, we will call it, then they drew up a contract from the basis of that order?
A. Yes.
Q. From the terms stated in that order, and that order was not used any more?
A. No; the regular lease took the place of it.
Q. The regular contract of lease took its place, and that lease was executed in duplicate, forwarded to the lessees, they executed it and returned it to the Mergenthaler Linotype Company?
A. Yes, sir.
Q. In New York City?
A. Yes.
Q. And there the Mergenthaler Linotype Company executed the contracts on their own accord?
A. Yes.
Q. There was no deviation from that routine? All of the machines to fill these orders, to fill these contracts of lease, were shipped from New York City into Missouri?
79 A. Yes, sir.
Q. The agent who took the order having nothing further to do with the order after the order and preliminary agreements passed out of his hands?
A. Yes.
Q. The Mergenthaler Linotype Company had no office in Missouri previous to January, 1913?
A. No, sir.
Q. And these traveling salesmen had no offices, were just traveling around from state to state?
A. That is right.
Q. You had nothing to do with the handling of supplies?
A. Nothing whatever. There may have been some order for supplies accompanying these agreements, but it was immediately passed through to the order department.

Q. Before January, 1913, I understand that all supplies that were ordered by holders of contracts in Missouri were furnished either from Chicago or New York? Kept none whatever in Missouri?

A. None whatever in Missouri.

Q. And these supplies were payable in Chicago?

80 A. Yes.

Mr. Ernest Green: Now, if Your Honor please, I next desire to offer in evidence the exhibits attached to the deposition of Frederick J. Warburton, taken in New York City on December the 28th, 1914—exhibits "A," "B" and "C," to be considered in connection with the testimony of that witness. (Mr. Green here introduced in evidence and read to the court the exhibits referred to, a copy of said exhibits being in words and figurs as follows:)

(Copy of Exhibit A.) (On Yellow Paper.)

Mergenthaler Linotype Company,

New York, Tribune Building.

San Francisco, 638-646 Sacramento St.

Chicago, 1100 S. Wabash Ave.

New Orleans, 549 Baronne St.

The Mergenthaler Linotype Company (hereinafter called the party of the first part) hereby agrees to hire for use to.....
.....
Street ..... City ..... State .....
(hereinafter called the party of the second part) at the annual rental of ..... Dollars ($.....) the following described property of first-class material and workmanship:

81 .....
.....

And the party of the second part hereby agrees to hire and take said property for use and to pay therefor to the party of the first part or to its order, in cash or in exchange on New York, the annual rental of ..... Dollars ($), payable yearly in advance; said hiring to be for a period of six years, but with the option to the party of the second part, at the end of the first year, to purchase the said property for the sum of .....
..... Dollars ($).

The party of the second part agrees to pay to the party of the first part the first year's rental, in cash or in exchange on New York, when said property is ready for shipment.

The party of the second part agrees to pay the railroad or freight charges from New York to destination on said property; also the cost of cartage, unboxing and handling from the depot to the floor where said properfty is to be erected, and also agrees to furnish a suitable foundation on which to erect said property.

82 The party of the second part agrees to keep the property in repair and to pay whatever taxes may be imposed upon the same during the term of lease.

It is agreed that the title of said property shall remain in the party of the first part until and unless a purchase of same is made by the party of the second part; and in case of any default in any of the terms of this contract, the party of the first part shall have the right to take immediate possession of said property.

The party of the second part agrees that the party of the first part shall insure said property for the sum of ..... Dollars ($), at the expense of the party of the second part, during the continuance of this lease.

(Reverse Side.)

1. Business or corporate title of lessee .....
.....
2. If incorporated, under the laws of what state?.....
.....
3. Have you a corporate seal? .....
4. If individual lessee, state full name and place of residence:
.....
5. If co-partners state partnership name and give full names and places of residence of each individual partner: .....
83 .....
6. Name of publication: .....
7. Location of Machine: Town .....
Street and number: .....Name of building
.....
8. Name and address of owner of building: .....
9. Bank with which you do business, and other references:.....
.....
.....
.....

Mergenthaler Linotype Company

and

.....
.....
.....

Date 19

Model .....

(Copy of Exhibit B.)

Mergenthaler Linotype Company.

New York, Tribune Building.

San Francisco, 638-646 Sacramento St.

Chicago, 1100 S. Wabash Ave.

New Orleans, 549 Baronne Street.

The Mergenthaler Linotype Company (hereinafter called
84 the party of the first part) hereby agrees to sell to .....
.....
Street ..... City ..... State .....
(hereinafter called the party of the second part) for the sum of
..... Dollars ($) the follow-
ing described property of *the* first-class material and workmanship:
.....
.....
.....
And the party of the second part hereby agrees to purchase said property and to pay to the party of the first part or to its order the sum named, in cash or in exchange on New York, when said property is ready for shipment.

The party of the second part agrees to pay the railroad or freight charges from New York to destination on said property; also the cost of cartage, unboxing and handling from the depot to the floor where said property is to be erected, and also agrees to furnish a suitable foundation on which to erect said property.

It is agreed that the title of said property shall remain in the party of the first part until the purchase price has been fully paid; and in case of any default in any of the terms of this contract, the
85 party of the first part shall have the right to take immediate possession of said property.

The party of the first part agrees, upon the conditions above stated being complied with, to ship the said property addressed to the party of the second part, and to execute and deliver to the party of the second part a good and sufficient Bill of Sale of the said property.

The party of the first part agrees that it will, if so requested by the party of the second part, furnish a competent mechanic to erect said property in first-class running order at the place of business of the party of the second part, and a skilled operator to instruct the employees of the said party of the second part in its use, but on the condition that the wages and expenses of the machinist and operator (including the time and amounts necessarily spent in traveling and waiting) shall be paid by the party of the second part.

This memorandum becomes an agreement binding the parties hereto upon and only upon its acceptance by the party of the first

part at the City of New York, by the signature of its authorized officers with the seal of the Company attached.

MERGENTHALER LINOTYPE COMPANY,

By .....

Date .....

86 Accepted:

MERGENTHALER LINOTYPE COMPANY,

.....[SEAL.]

.....

Vice-President.

.....

Assistant Secretary.

.....[SEAL.]

.....[SEAL.]

Date.....

(Reverse Side.)

1. Business or corporate title of purchaser .....

.....

2. If incorporated, under the laws of what state? .....

3. Have you a corporate seal? .....

4. If individual purchaser, state full name and place of residence:

.....

5. If co-partners, state partnership name and give full name and places of residence of each individual partner: .....

.....

6. Name of publication: .....

7. Location of Machine: Town .....

Street and number: ..... Name of building

.....

8. Name and address of owner of building: .....

87 9. Bank with which you do business, and other references:

.....

.....

.....

Mergenthaler Linotype Company

and

.....

.....

.....

Date ..... 19—.

Model .....

(Copy of Exhibit C.)

Mergenthaler Linotype Company.

New York, Tribune Building.

San Francisco, 638-646 Sacramento St.

Chicago, 1100 S. Wabash Ave.

New Orleans, 332 Camp Street.

The Mergenthaler Linotype Company (hereinafter called the party of the first part) hereby agrees to sell to .....
.....
Street ..... City ..... State .....
(hereinafter called the party of the second part) for the sum of ..... Dollars ($) the following described property of first-class material and workmanship: .....
.....
.....

And the party of the second part hereby agrees to purchase said property and to pay to the party of the first part or to its order the sum named in the following manner:

In cash or in exchange on New York, when said property is ready for shipment ..... Dollars ($) and the balance in installments (to be further evidenced by promissory notes of said party of the second part) bearing interest at the rate of six per cent per annum from the date of which said property is ready for shipment by the party of the first part, falling due after said date and in amounts as follows:

.....
.....

All of which shall be secured by a first mortgage or lien upon said property in the usual form used by the said party of the first part, which mortgage or lien said party of the second part hereby agrees to properly and legally execute, acknowledge and deliver to the party of the first part.

The party of the second part agrees to pay the railroad or freight charges from New York to destination on said property; also
89 the cost of cartage, unboxing and handling from the depot to the floor where said property is to be erected, and also agrees to furnish a suitable foundation on which to erect said property.

It is agreed that the title of said property shall remain in the party of the first part until the cash payment is made and said mortgage or lien is given, or until the purchase price with interest has been fully paid; and in case of any default in any of the terms of this contract, party of the first part shall have the right to take immediate possession of said property.

The party of the second part agrees to insure said property for at

least eighty per cent of its selling price, immediately upon its receipt and before its erection, in a company or companies satisfactory to the party of the first part (loss, if any, first payable to the Mergenthaler Linotype Company, *at* its interest may appear) and to deposit the policy or policies thereof with the party of the first part.

The party of the second part agrees, whenever so requested, to furnish to the party of the first part a Waiver of Landlord's Lien upon said property.

The party of the first part agrees, upon the conditions above
90 stated being complied with, to ship the said property to the party of the second part, and to execute and deliver to the party of the second part a good and sufficient Bill of Sale of said property.

The party of the first part agrees that it will, if so requested by the party of the second part, furnish a competent mechanic to erect said property in first-class running order at the place of business of the party of the second part, and a skilled operator to instruct the employees of the said party of the second part in its use, but on the condition that the wages and expenses of the machanist and operator (including the time and amounts necessarily spent in traveling and waiting) shall be paid by the party of the second part.

This memorandum becomes an agreement binding the parties hereto upon and only upon its acceptance by the party of the first part at the City of New York, by the siignatures of its authorized officers with the seal of the company attached.

MERGENTHALER LINOTYPE COMPANY.

By .....

Date.....

Accepted:

MERGENTHALER LINOTYPE COMPANY.

.....

Vice-President.

.....

Assistant-Secretary.

91 .....[SEAL.]

.....[SEAL.]

.....[SEAL.]

Date.....

(Reverse Side.)

1. Business or corporate title of purchaser.....
2. If incorporated, under the laws of what state?.....
3. Have you a corporate seal .....
4. If individual purchaser, state full name and place of residence.
5. If co-partners, state partnership name and give full names and places of residence of each individual partner.....

6. Name of publication.....
7. Location of machine. Town..... Street and number..... Name of building.....
8. Name and address of owner of building.....
9. Bank with which you do business, and other references.....

92 Mergenthaler Linotype Company

and

.....
.....
.....

Date.....19

Model.....

Mr. Ernest Green: Now, if the court please, I want to offer in evidence the deposition of W. R. Harley, taken in this case in Kansas City, Missouri, on the 29th day of September, 1914, before Bertha L. Johnson, Notary Public, at the law offices of Scarritt, Scarritt, Jones and Miller, in the Scarritt Building, Kansas City. The deposition reads as follows:

W. R. HARLEY, of lawful age, being produced, sworn and examined on the part of the defendant W. B. Hays, deposeth and saith:

Witness' name is W. R. Harley, he resides at 2837 East Sixth Street, Kansas City, Missouri. He is 28 years old. He checks orders and sort of looks after the general office work for plaintiff in Kansas City. Witness stated that he took supply orders for the Mergenthaler Linotype Company, plaintiff in this case. He was subpoenaed on yesterday to give his deposition at eleven
93 o'clock this morning,. but did not appear. Witness did not appear because Mr. North told him Mr. Green would not be ready at that time, and he gave him until two o'clock. He did not appear at two o'clock because he had telephoned to plaintiff's Chicago office, and that office stated that the witness was to tell the attorneys that they should turn the matter over to plaintiff's attorneys Dinning & Kinder at Poplar Bluff, Mo.; that the witness had nothing to do with the case there, and all matters, as far as contracts for machines were concerned, were handled by plaintiff's contract department at New York; that is as far as the witness knows. Witness talked to the assistant manager of plaintiff's Chicago office, whose name was W. C. Bleloch. Witness had sent the notice of subpoena to Chicago on the 6:20 train, and Mr. Bleloch had gotten it in the morning. Witness called the Chicago office on long distance phone. At that time the Chicago office had received the subpoena for him, and Mr. Bleloch, the Assistant Manager, instructed him not to appear and give testimony. The reason witness refused to appear and testify at two o'clock and until attached, was because of what the Chicago office had said to him over the telephone. The

Kansas City office had no connection whatever with the
94 matters at issue in this case. It did not handle contracts in any way, and for that reason witness thought he would just tell those persons taking the deposition over the telephone to refer this matter to the lawyers at Poplar Bluff. Witness notified the Chicago office that the subpoena as served upon him instructed him to bring with him all records, books and papers of the company which he had in his office, relative to contracts in force in the State of Missouri. Copy of this subpoena was sent by witness to the Chicago office. Nothing was said in the telephone conversation with the Chicago office relative to these records, books and papers referred to in the subpoena.

Mr. Will S. Menamin is State Manager for Missouri of the Mergenthaler Linotype Company. He sells machines and also has charge of the Kansas City house. His office is located at Kansas City, but he was not in the city at the time of the taking of the deposition. He is in the city only part of the time, but when he goes out, the witness holds up matters for him to take care of. Witness did not know when Mr. Menamin would return to Kansas City. Witness stated that he did not have in the Kansas City office a record showing the names and addresses of all persons in the State
95 of Missouri, who have contracts or leases by which they lease linotype machines from the Mergenthaler Linotype Company. The Chicago office does not have the records, because all the specifications are sent to the New York Contract Department. Witness did not know the names of any parties in the State of Missouri that had linotype machines leased from the plaintiff. He did not know that they had contracts or leases all over the State of Missouri. He knew nothing about the contracts or leases, being familiar only with the price of machines. He was not familiar with the terms by which the machines were let out. Witness did not know whether they had any machines leased in the State or not. Witness had been working for the Mergenthaler Linotype Company for nine years, but he had never been in the sales department. He had worked in all different departments, supplies, shipping and practically what he was doing in Kansas City, but he had never been connected with the sales department. He had worked in the State of Missouri a little over a year. Mr. Menamin became State Manager for Missouri in April; but witness had been employed in the Kansas City house ever since last September. Mr. Menamin had been traveling over the state prior to taking charge of the Kansas City
96 house. The Kansas City office is just a supply house. Witness did not know how long Mr. Menamin had been traveling in this state; but did not think it had been over a year. Witness did not know who was in charge of the Missouri business before Mr. Menamin. Witness did not know who was in charge of the business in 1910, as the Kansas City house was not installed then. He did not know who was selling machines at that time, as they had different salesmen. Plaintiff has no office in St. Louis. It has no other office in the State of Missouri, other than the Kansas City office. The only place a list of the contracts between plaintiff and per-

sons residing in and doing business in Missouri, which were in force and effect during May, 1910, could be obtained would be the New York office contract department. The Chicago office makes a record of contracts entered into by entering the names in a book, but the specifications go to the New York office to be handled by the contract department. The Kansas City office does not even keep a copy of the specifications. The only place a list of the contracts that were in force and effect during the year 1910, and prior thereto, could be obtained, would be in the New York office. Witness
97 had no knowledge as to how many were in force at that time, neither did he know how many were in force at the present time. He has no such record in his office. Witness did not know how many machines plaintiff had installed in the State of Missouri during the year 1910. There was associated in the office with the witness, a young lady by the name of Miss Edith Freeland. She was also subpoenaed to appear at the taking of the depositions. She did not appear for the same reason the witness did not. Witness did not tell Miss Freeland that the Chicago office said she need not appear. He merely told her that he thought what he told the persons taking the depositions would probably take care of the matter, and she would not have to attend the taking of depositions. Witness stated at the time he notified Mr. North, in the office of Scarritt, Scarritt, Jones & Miller, that he refused to appear in obedience to the subpoena, that he also notified Mr. North that Miss Freeland refused to appear for the same reason. The only reason why witness refused to appear and give such information as he had relative to the matter, was because of the instructions given him by the Assistant Manager of plaintiff in Chicago. Witness stated the reason he really did not appear, was, as he had stated over the tele-
98 phone to Mr. North, that the Assistant Manager told him to have the attorneys refer the matter to the lawyers at Poplar Bluff; that witness did not have anything to do with the matter and that all the contracts were handled by the New York office. As a matter of fact, the witness stated he did not appear to give his deposition until he was attached by the Deputy Sheriff, and at that time he did not bring with him any of the records, books and papers called for.

Mr. Ernest Green: Now, if the court please, I want to next offer in evidence the certificate of Honorable Cornelius Roach, Secretary of State, of the State of Missouri, containing a full, true and complete copy of the license to do business granted to the plaintiff, Mergenthaler Linotype Company, which I will hand to the Stenographer and ask him to mark it defendant's "Exhibit D." (Mr. Green here handed the document referred to to the Stenographer, who marks said document defendant's "Exhibit D.")

STATE OF MISSOURI,
Department of State:

To All to Whom These Presents Shall Come:

I, Cornelius Roach, Secretary of State of the State of Missouri and Keeper of the Great Seal thereof, hereby certify that the an-
99 nexed pages contain a full, true and complete copy of Certificate and License in re Mergenthaler Linotype Company, issued December 30th, 1912, as the same appears on file and of record in this office.

I hereby further certify that certificate and license, copy of which is annexed, is the only certificate and license that has been issued to Mergenthaler Linotype Company to do business in Missouri as a corporation, and that previous to December 30, 1912, the said Mergenthaler Linotype Company was not licensed to do business in Missouri as a foreign corporation.

In testimony whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this Seventh day of April, A. D. Nineteen Hundred and Thirteen.

[SEAL.] CORNELIUS ROACH,
Secretary of State.

STATE OF MISSOURI:

No. 2332.

Certificate and License.

Whereas, Mergenthaler Linotype Company, incorporated under the laws of the State of New York, has filed in *this* office of the
100 Secretary of State duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of law governing Foreign Private Corporations:

Now, therefore, I, Cornelius Roach, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said Mergenthaler Linotype Company is from the date hereof duly authorized and licensed to engage in the State of Missouri exclusively in the business of buying, selling and dealing in generally, printers' and publishers' sundries and supplies; furnishing parts of linotype machines, matrices, attachments, tools, and all articles and things of a like nature and character, which is authorized by its charter for a term ending December 16, 1945, and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State; that the amount of the capital stock of said corporation is Fifteen Million Dollars, and the amount of said capital stock represented by its property located and business transacted in the State of Missouri is approximately Twenty-five Thousand Dollars, and that

its public office for the transaction of business in Missouri is located at Kansas City.

101 In testimony whereof I hereunto set my hand and affix the Great Seal of the State of Missouri.

Done at the City of Jefferson, this 30th day of December, A. D. —— Hundred and Twelve.

[SEAL.] CORNELIUS ROACH,
Secretary of State.

Mr. Ernest Green: Your Honor, I now want to offer in evidence the replication filed in this case on the 25th day of April, 1913, by the plaintiff Mergenthaler Linotype Company. I don't know whether Your Honor recalls that replication or not, so I want to read it for the purpose of contradicting the testimony showing the manner in which the contract was entered into. (Mr. Green here read said replication to the Court, a copy of said replication being in words and figures as follows:)

STATE OF MISSOURI,
County of Butler, ss:

In the Circuit Court, to April Term, 1913.

MERGENTHALER LINOTYPE COMPANY, Plaintiff,

vs.

W. B. HAYS, Defendant.

Now on this day, by leave of Court, first obtained, plaintiff files this, its replication, to the separate amended answer filed by defendants, W. B. Hays and Samuel Davis.

102 For such replication plaintiff states the following:

Plaintiff admits that it was at the time of the execution of the contract and lease set out and referred to in plaintiff's petition was and now is a foreign corporation organized and existing under the laws of the State of New York, and that it was organized for pecuniary benefit.

Plaintiff denies that at the date of said contract and lease it had not complied with the laws of the State of Missouri relating to foreign corporations.

Plaintiff admits that at the time of the making of the contract and lease set out in its petition it had not filed with the Secretary of State of Missouri a copy of its articles of association and charter granted by the State of New York. Also admits that at the time of the making of the contract and lease referred to it had not filed with the Secretary of State of the State of Missouri a copy of its articles of association and charter granted by the State of New York. Also admits that at that time it had not procured from the Secretary of State a license to do business in the State of Missouri.

103 Further replying to said amended answer this plaintiff states: That at the time of the execution of the contract and lease referred to in its petition it was not doing business in the State of Missouri, nor did it keep an office in said state for the purpose of transacting its business authorized to be transacted by its charter and articles of incorporation. That at the time of the making of said contract and lease plaintiff had a salesman traveling in Missouri soliciting persons to buy the linotype machine mentioned in plaintiff's petition; that the said traveling salesman employed by plaintiff at that time made the contract and lease referred to in plaintiff's petition with these answering defendants, W. B. Hays and S. W. Davis, subject to the approval and ratification by plaintiff at its office in New York; that said contract and lease was agreed to, approved and executed by plaintiff at its office in New York on the date it bears; that plaintiff's salesman in Missouri presented its contract and lease to these answering defendants who executed the same, and; that said linotype machine was delivered to these answering defendants W. B. Hays and S. W. Davis.

Plaintiff alleges that it did not open an office in Missouri
104 for the transaction of business until the first of January, 1913.

DINNING & KINDER,
Attys. for Plff.

W. B. HAYS, one of the defendants herein, having been first duly sworn, testified in his own behalf as follows:

Direct examination.

By Mr. Ernest Green.

Q. State your name to the court?
A. W. B. Hays.
Q. Where do you live, Mr. Hays?
A. Poplar Bluff, Missouri.
Q. You are one of the defendants in this case, are you?
A. Yes, sir.
Q. Do you know Mr. Samuel W. Davis?
A. Yes, sir.
Q. Did you know him in May, 1910?
A. Yes, sir.
Q. Now, about that time did you become acquainted with the representative of the plaintiff, Mergenthaler Linotype Company?
A. Well, I don't know just when I became acquainted
105 with him, but I have known him since that time.
Q. Well, did you have any dealings with him relative to the matter of leasing a machine from the Mergenthaler Linotype Company?
A. Yes, sir; I did; I think it was in May, 1910.
Q. Who was the man that you had the dealings with?
A. Mr. Nelis.
Q. Now, at that time did you execute a contract with Mr. Nelis?

A. I signed a contract; yes, sir.

Q. Now, was that the preliminary contract testified about in the depositions that were offered here in evidence today?

A. That is the only contract that I ever remember to have signed.

Q. Now, what was done with the contract that you signed?

A. Nelis took the contract that I signed and carried it with him to Cape Girardeau to get Davis' signature.

Q. Now, then, the contract which is sued on in this case and of which this is a copy, I will ask you if you ever signed that contract?

106 Mr. Hill: Now, if the court please, I object to that; it is recited here in the answer, " * * * that said plaintiff Mergenthaler Linotype Company, a foreign corporation of New York, had not at the time of the making of the alleged contract set out in the plaintiff's petition, * * * etc."; there is an admission that this contract was made, since it is not denied under oath.

Mr. Green: If Your Honor please, the pleadings do not admit that we signed any contract.

Mr. Hill: Nobody knows better than counsel for the defendant that he did sign it.

The Court: Read the question.

(Stenographer reads question.)

The Court: Objection overruled.

Mr. Hill: And if the court please, I want to make the objection to what he is asking about whether it was the original lease sent to the company, I want to object to it because it is not specific enough.

The Court: Sustained.

Mr. Green: Now, Mr. Hays, I will ask you this question: Whether you executed another contract other than the preliminary contract that you delivered to Mr. Nelis?

A. I never signed but one contract.

107 Q. And that is the one that you gave him?

A. Yes, sir.

Q. Where did you get that copy that you have got that?

A. Well, I don't just know where I got this for sure, but I am under the impression that Nelis left the contract at the office—any way left a contract something like this at the office.

Q. Who was the active manager of the Citizen-Democrat?

A. Mr. Davis.

Q. After the conversation that you had at the time of the execution of the preliminary contract with Mr. Nelis, did you pay any further attention to the matter?

A. No; not after that; it was all left with Mr. Davis.

Q. When was the first time that you knew there was any claim for any rent on this machine?

A. After Mr. Davis left there—you know later——

Q. How did you become apprised of the claim?

A. Why, I had a letter from Mr. Nelis in which he informed that the rent was due on it.

108 Q. Well, at that time did you undertake to return the machine to them?

Mr. Hill: Now, if Your Honor please, that is objected to; there is no plea of any return of any machine—no defense of that kind relied on.

The Court: I don't think there is.

Mr. Hill: We object to it as immaterial.

Mr. Green: If the court please, now, I want to show this: That Mr. Davis was the man in charge of this matter, that Mr. Hays never had anything to do with it, and that when he found out about this that he has been willing to return the machine to them—has tried to send it back.

Mr. Hill: That is not pleaded, Your Honor, or relied on in this case.

The Court: Objection sustained.

To which ruling of the court the defendant, W. B. Hays, by counsel, objected and excepted at the time.

Mr. Green:

Q. Well, now, Mr. Hays, in order to get this thing certain, I want to ask which contract now it was that you signed, the one that Nelis had, or some other contract?

A. Why, the one that Nelis had.

Q. That is the preliminary contract referred to in this testimony?

109 A. Yes, sir. Well, I don't know about it being a preliminary contract—I don't know the preliminary contract from the regular contract—I haven't seen all of the contracts.

Mr. Green: I believe that is all, Mr. Hays.

Cross-examination.

By Mr. Hill:

Q. Mr. Hays, this copy here that Mr. Green asked you about awhile ago, that is the copy that he left at the office of the Citizen-Democrat and you turned over to your attorneys in this case?

A. I think so.

Q. And you are telling the court you don't recollect about it because Mr. Davis had charge of all of these matters?

A. Yes, sir.

Mr. Hill: That's all.

Mr. Green: That's all.

(Witness excused.)

Mr. Ernest Green: Now, if Your Honor please, I next want to introduce in evidence this duplicate contract of the one sued on—the duplicate left at the Citizen-Democrat office with Mr. Davis. It is

the only one they kept—in other words it is the "final contract." I will hand it to the stenographer and *and* ask him to mark it defendant's "Exhibit E.". It is the same as the "Exhibit
110 A" attached to the original petition in this case, with the exception that that one is all signed up on the typewriter and this one—this "Exhibit E" is signed by the officers of the Mergenthaler Linotype Company but not signed by either Mr. Hays or Mr. Davis. (Exhibit E introduced.)

(Exhibit "E" is exactly the same as Exhibit "A" hereinbefore set out, except that Exhibit "E" is signed

MERGENTHALER LINOTYPE COMPANY,
By NORMAN DODGE,
Second Vice-President.

Attest:
[SEAL.] J. W. HEARD,
Assistant Secretary.

On Exhibit "E" the signatures of W. B. Hays and Samuel W. Davis are not attached and do not appear. In other words, Exhibit "E" is signed by the plaintiff's officers, but is not signed by either Mr. Hays or Mr. Davis.

I believe that is all, Your Honor.

The defendant, W. B. Hays, here rested.

111 And thereupon, the plaintiff, to further maintain the issues on *his* behalf, offered and introduced in rebuttal, the following evidence:

Mr. Hill: Now, if the court please, I next want to introduce in evidence the answer filed by Attorneys Sheppard & Green—the separate amended answer filed in this court on April 8th, 1913, admitting the execution of contract marked "Exhibit A," filed with the petition. (Answer introduced, which is as follows:)

(Caption Omitted.)

Now at this time comes W. B. Hays, one of the defendants in the above entitled cause, and leave of court first had and obtained, files this his amended answer herein, and states that he denies each and every allegation in said petition contained.

Further answering, this defendant states that the plaintiff, the Mergenthaler Linotype Company, at the time of the execution of the contract and lease set out in plaintiff's petition, was and is still a foreign corporation, incorporated, organized and existing under the laws of the State of New York; and that said corporation is a corporation organized for pecuniary benefit, and as such has not complied with the laws of the State of Missouri relating to foreign corpora-

tions, in this: that said Mergenthaler Linotype Company of
112 New York had not at the time of the making of the contract and at the time of the bringing of this suit, filed with the Secretary of State of the State of Missouri, a copy of its articles of association and charter granted by the State of New York, and had not then procured from the Secretary of State a license to do business in the State of Missouri.

Defendant further states that the Mergenthaler Linotype Company of New York, not having complied with the laws of this State regulating foreign corporations as aforesaid, and not having received a certificate for a license from the Secretary of State authorizing it to do business in this State as aforesaid, *is* was and is unlawful for said corporation to transact business in this State without a compliance with the statute in such cases made and provided, and that the contract and lease referred to in plaintiff's petition is unlawful and void, and plaintiff cannot maintain this suit.

SHEPPARD & GREEN,
Attorneys for Defendant W. B. Hays.

Mr. Green: But we don't admit that our answer admits the execution of the contract.

Mr. Hill: Well, if you still say that Mr. Hays never signed the contract we can produce the original contract mighty easy—
113 if the answer don't admit it.

Mr. Hill: Now, I next desire to offer in evidence the opinion of the Springfield Court of Appeals, rendered in this case.

(Opinion introduced, which is as follows.)
(Clerk here copy.)

Mr. Hill: That is all we have to offer.

The Plaintiff here rested.
The Defendant, W. B. Hays, here rested.

Mr. Green: We have got some declarations of law that I would like to have Your Honor pass on.

Mr. Hill: I am ready to submit mine right now.

And the above and foregoing was all the evidence offered or introduced by either party in this cause.

The defendant W. B. Hays here offered and requested the court to give a declaration of law in the nature of a demurrer, a copy of said declaration being in words and figures as follows:

114 MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS et al., Defendants.

II.

Now at the close of all the evidence in this case, the court declares the law to be that under the law and the testimony introduced herein, that the finding must be for the defendant W. B. Hays.

Which said declaration of law the court failed and refused to give; and to the action of the court in so failing and refusing to give said declaration of law, the defendant W. B. Hays, by counsel, objected and excepted at the time.

The defendant W. B. Hays here offered and requested the court to give the following declarations of law:

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS et al., Defendant-.

VI.

The court declares the law to be that the burden is upon the plaintiff of proving each and every material element of its case, and unless the court finds that it has so proven its case, the finding of the court must be for the defendant, W. B. Hays.

115 VIII.

The court declares the law to be that unless plaintiff has proven by a greater weight or preponderance of the evidence in this case that the defendant W. B. Hays executed the contract sued on, that the finding of the court must be for the defendant, W. B. Hays.

Which said declaration- of law, and each of them the court gave; and to the action of the court in giving said declarations of law, the plaintiff, by counsel, objected and excepted at the time.

The defendant, W. B. Hays, here offered and requested the court to give the following declarations of law:

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS et al., Defendants.

III.

The court declares the law to be that if the court finds and believes from the evidence in this case, that on the 12th day of May, 1910,

the plaintiff, Mergenthaler Linotype Company, had in force in the State of Missouri, various leases and contracts, all of which presupposed the employment of a portion of the capital stock of said plaintiff corporation in the State of Missouri, then the contract entered into between plaintiff and defendant is void, and the
116 finding of the court in this case must be for the defendant, W. B. Hays.

IV.

The court declares the law to be that if the court finds and believes from the evidence offered in this case, that at the time of the execution of the contract sued on in this case, plaintiff was engaged in transacting business in the State of Missouri, that is, it was engaged in the business of leasing, and had leased other linotype machines in the State of Missouri, then the finding of the court will be for the defendant, W. B. Hays.

V.

The court declares the law to be that if the court finds and believes from the evidence in this case, that on May 12th, 1910, the date the contract sued on in this case was executed, that the plaintiff, Mergenthaler Linotype Company, had employed in the State of Missouri a portion of its capital stock, and had other linotype machines leased in the State of Missouri, and that at the time it did not have a license to transact business in the State of Missouri, then the finding of the court must be for the defendant, W. B. Hays.

117 VII.

The court declares the law to be that there is no proof in this case as to the execution of the contract sued on and that therefore the finding of the court must be for the defendant, W. B. Hays.

Which said declaration- of law, and each of them, the court failed and refused to give; and to the action of the court in so failing and refusing to give said declarations of law, the defendant, W. B. Hays, by counsel, objected and excepted at the time.

The Court: Mr. Clark, let the record show that the case is submitted.

And afterwards, to-wit: on the 19th day of January, A. D. 1915, it being one of the days of the regular January Term, 1915, of the Butler County Circuit Court, this case was again taken up and the following further proceedings were had, to-wit:

Mr. Hill: If the court please, I would like to offer some more evidence in this case of Mergenthaler Linotype Company vs. W. B. Hays et al.

Mr. Leslie Green: If the court please, we object to any further testimony or the introduction of any other evidence in this case, for

the reason that the case is closed. This case doesn't belong to
118 the firm—it is Earnest's own individual case—the firm has nothing to do with it. We are objecting to the submission of any testimony in this case at this time because the case is finally closed.

Mr. Hill: I want to amend the petition in this case.

The Court: I wouldn't permit you to make any amendment now.

Mr. Hill: The Court of Appeals would allow me to amend my petition—I just want to interline one word.

The Court: If you can make an amendment in the Court of Appeals, go ahead and make it there. I wouldn't let you introduce anything unless Mr. Green was here—they claim it is his case and not the firm's.

Mr. Hill: I ask leave of court to interline in the petition these three words, "a copy of," to show what is filed with the petition is a copy of the contract and not the original, and then in the 25th line of the amended petition the words "that and said"—I ask leave to make that amendment to conform with the proof.

Mr. Leslie Green: We are objecting to this, Your Honor, at this time.

The Court: Objection sustained.

Mr. Hill: Come around, Mr. McGuire.

119 WILLIAM MCGUIRE, Clerk of the Butler County Circuit Court, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hill:

Q. Mr. McGuire, you are Clerk of this court, are you?
A. Yes, sir.
Q. Are you familiar with the handwriting of Mr. W. B. Hays?

Mr. Leslie Green: We are objecting, if the court please, to the taking of any more testimony at this time—this case was finally submitted one day last week.

The Court: Let's see what he is trying to get at.

Mr. Hill:

Q. Are you familiar with W. B. Hays' handwriting?
A. Yes, sir.
Q. I will ask you to tell the court if this is the signature on this document, (handing witness document) is that his signature?
A. Yes, sir.

Mr. Hill: That's all.

(Witness excused.)

120 Mr. Hill: Now, if the court please, I desire to read in evidence the original contract in this case, recorded in book —, page 330 of the Recorder's office of Butler County, Missouri, it is

dated the twelfth day of May, 1910, and recorded on May 18, 1910, and signed by the plaintiff Mergenthaler Linotype Company and by W. B. Hays and Samuel W. Davis—the signatures of W. B. Hays has been identified by Mr. William McGuire, Clerk of this court, which is as follows:

(Clerk here copy.)

Mr. Leslie Green: We object, if the court please, to the introduction of that at this time, for the reason heretofore assigned, and for the further reason that we don't know whether that is the same contract alleged to have been entered into.

The Court: Objection sustained.

To which ruling of the court the plaintiff, by counsel, objected and excepted at the time.

Mr. Hill: I want the record to show that this offer is made before the plaintiff's offer of any declaration of law and before the court has passed on any declaration of law offered by the defendant W. B. Hays—that is a fact, isn't it?

The Court: I don't think I have.

Mr. Hill: I desire the record to show that my offer of—to
121 amend the petition was before the plaintiff had submitted to the court its declaration of law, and before the defendant's declarations of law had been passed on by the court. That is correct, isn't it?

Mr. Arnot Sheppard: And do you want it to further show that this case was tried in a hurry so one of the attorneys could catch a train?

The Court: I don't know as that would make any difference.

Mr. Hill: I believe that is all.

And thereafter, to-wit: On the 19th day of January, A. D. 1915, the same being the thirteenth day of the regular January, 1915 Term of the Butler County Circuit Court, and the same term at which the case was tried, the court rendered and duly caused to be entered of record a judgment in this cause; a copy of said judgment, as the same appears of record, being in words and figures as follows:

Book 31, Page 62-63

Circuit Court Record, Butler County, Missouri.

Tuesday, January 19th, Thirteenth Day of January Term, 1915.

122

No. 3115.

MERGENTHALER LINOTYPE COMPANY, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now at this time again come the parties, plaintiff and defendants in the above entitled cause, by their respective attorneys, and this

cause having heretofore been submitted to the court, a jury being waived, and the court having heretofore heard and seen all the evidence offered, and being fully advised in the premises, all and singular, finds the issues in this cause for the plaintiff and against both defendants.

The court further finds that the defendants, William B. Hays and Samuel W. Davis, are indebted to the plaintiff in the sum of Two Thousand Eight Hundred and Fourteen Dollars and Ninety-two Cents, which includes the debt and six per cent interest on the amount named in the original petition from the date of the commencement of the suit, and six per cent interest on the additional amount expressed in the amended petition from the date of the filing thereof to this date; and that the plaintiff is entitled to recover six per cent interest on said indebtdness from this date.

Wherefore, it is considered, ordered and adjudged by the court that the plaintiff, Mergenthaler Linotype Company, a cor-
123 poration, have and recover of and from the defendants, William B. Hays and Samuel W. Davis, the said sum of Two Thousand Eight Hundred Fourteen Dollars and Ninety-Two Cents, with six per cent interest thereon from this date, and have execution therefor.

And to the rendition of said judgment by the court, the defendants, by counsel, objected and excepted at the time.

And thereafter, to-wit: On the 20th day of January, 1915, it being the — day of the regular January Term, 1915, of this court, and the same term at which the judgment of the court was rendered in this cause, and within four days of the date on which the said judgment was rendered, the defendant, W. B. Hays, caused to be filed with the clerk of this court his motion for a new trial of this cause, a copy of said motion being in words and figures as follows:

State of Missouri,
County of Butler:

In the Circuit Court of Butler County, Missouri, to January Term, 1915.

No. 3113.

Mergenthaler Linotype Company, a Corporation, Plaintiff,

vs.

W. B. Hays and Samuel W. Davis, Defendants.

Now at this time, and within four days from the rendition of the judgment herein, comes the defendant, W. B. Hays, and
124 respectfully moves the court to set aside its finding and judgment rendered herein on the 19th day of January, 1915, and to grant him a new trial of the issues joined herein for the following reasons, to-wit:

1st. Because the finding and judgment of the court in said cause is against the evidence, against the weight of the evidence, and against the law under the evidence.

2nd. Because the finding and judgment was for the wrong party.

3d. Because the court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.

4th. Becaue the court erred in rejecting competent, relevant and material evidence offered by the defendant.

5th. The court erred in overruling the demurrer to the evidence offered at the close of plaintiff's case.

6th. The court erred in overruling the demurrer to the evidence offered at the close of the entire case.

7th. The court erred in refusing defendant's declarations of law Numbered 1, 2, 3, 4, 5 and 7.

125 8th. The amount of the judgment assessed by the court is excessive.

9th. Because the court erred in not finding that contract sued on was void.

10th. Because the court erred in not finding that plaintiff was engaged in transacting business in the State of Missouri in violation of the provisions of the statutes of the State of Missouri.

11th. The court erred in finding that the contract sued on in this case had been executed by the defendant, W. B. Hays.

12th. Because, upon the whole record the finding and judgment of the court herein should have been for the defendant W. B. Hays.

SHEPPARD, GREEN & SHEPPARD AND
HOPE, GREEN & SEIBERT,
Attorneys for Defendant W. B. Hays.

And afterward, to-wit: on the—day of January, 1915, it being one of the days of the regular January Term, 1915, of the Circuit Court within and for the County of Butler and State of Missouri, and the same term in which the defendant's motion for a new trial of this cause was filed, the court overruled the defendant's said motion for a new trial, by its order duly entered of record; a copy of

126 said order as the same appears of record being in figures as follows:

Butler Counyt Circuit Court Record.

Book 31, Page 67.

Wednesday, January 20th, 1915, Fourteenth Day of January Term.

No. 3113.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,
vs.
W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now come the defendants by their attorneys of record and leave of court first had and obtained, filed their motion for a new trial in

the above entitled cause, and the court having now seen and examined said motion and being fully advised in the premises, doth in all things overrule the same.

And to the action of the court in overruling the defendant's said motion for a new trial of this cause, the defendant W. B. Hays, by counsel, objected and excepted at the time.

Afterward, to-wit: on the 20th day of January, 1915, it being one of the days of the regular January Term, 1915, of said court, and the same term at which the defendant's motion for a new trial was by the court overruled, the defendant W. B. Hays caused to be filed with the clerk of this court his motion in arrest of judgment; a
127 a copy of said motion in arrest of judgment being in words and figures as follows:

STATE OF MISSOURI,
County of Butler, ss:

In the Circuit Court of Butler County, Missouri, to January Term, 1915.

No. 3113.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now at this day, and within four days from the rendition of the judgment herein, comes the defendant W. B. Hays and respectfully moves the court to arrest the judgment rendered in the above entitled cause on the 19th day of January, 1915, for the following reasons, to-wit:

1st. Because plaintiff's petition wholly fails to state a cause of action.

2nd. Because under the pleadings filed herein, no judgment ought to be rendered for the plaintiff herein.

3d. Because upon the whole record, the finding and judgment of the court herein should have been for the defendant W. B. Hays.

SHEPPARD, GREEN & SHEPPARD AND
HOPE, SEIBERT & GREEN,
Attorneys for Defendant W. B. Hays.

128 And afterward, to-wit: on the 20th day of January, 1915, it being one of the days of the regular January Term, 1915, of the said court, and the same term at which the defendant's motion in arrest of judgment was filed in this cause, the court overruled defendant's motion in arrest of judgment, by its order duly entered of record; a copy of said order, as the same appears of record, being in words and figures as follows:

Circuit Court Record, Butler County, Missouri.

Book 31, Page 67.

Wednesday, January 20th, 1915, Fourteenth Day of January Term.

No. 3113.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now again come the defendants by their respective attorneys and leave of court first had and obtained, file their motion in arrest of judgment in the above entitled cause, and the court having now seen and examined said motion and being fully advised in the premises, all and singular, doth in all things overrule the same.

And to the action of the court in overruling said motion in arrest of judgment, the defendant W. B. Hays, by counsel, objected
129 and excepted at the time.

And afterward, to-wit: on the 20th day of January, 1915, it being one of the days of the regular January Term, 1915, of said court, and the same term at which the defendant's motion in arrest of judgment in this cause was filed and by the court overruled, the defendant W. B. Hays caused to be filed with the clerk of this court his application and affidavit for an appeal of this cause; a copy of the said application and affidavit for an appeal being in figures and words as follows:

STATE OF MISSOURI,
County of Butler, ss:

In the Circuit Court of Butler County, Missouri, to January Term, 1915.

No. 3113.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Leslie C. Green, being duly sworn, upon his oath says that he is one of the attorneys for the defendant W. B. Hays, and as such attorney and agent is duly authorized to make this affidavit for and on behalf of said defendant W. B. Hays.

Affiant further states upon his oath that the appeal prayed for by

defendant W. B. Hays herein is not made for vexation or delay, but because this affiant verily believes the defendant W. B. Hays
130 to be aggrieved by the judgment and decision of the Circuit Court herein.

LESLIE C. GREEN.

Subscribed and sworn to before me this 20th day of January, 1915.

[SEAL.] WM. McGUIRE,
Circuit Clerk Butler County, Missouri.

Which said application for an appeal was by the court granted by its order duly entered of record; the court by the same order allowing the defendants to prepare and have signed their Bill of Exceptions in this cause; a copy of said order of record being in figures and words as follows:

Circuit Court Record, Butler County, Missouri.

Book 31, Page 67.

Wednesday, January 20th, 1915, Fourteenth Day of January Term.

No. 3113.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now again come the defendants by Leslie C. Green their attorney and agent, and leave of court first had and obtained, file their application and affidavit in due form for an appeal from the final judgment rendered by the court in the above entitled cause, and
131 the court having now seen and examined said application and affidavit for an appeal, doth sustain the same, and thereupon said defendants are by the court granted an appeal to the Springfield Court of Appeals; and the appeal bond herein is by the court fixed at the sum of Five Thousand Seven Hundred Dollars, and said defendants are granted ten days from the final adjournment of this term of court within which to file said bond and the clerk of this court is hereby authorized and directed to approve the same; and it is further ordered by the court that said defendants have ninety days from this date within which to perfect, have signed and file their Bill of Exceptions in this cause.

Time for filing Bill of Exceptions was extended ninety days from April 19, 1915, by an order of court made on April 19, 1915, twelfth day of April Term, 1915, Book 31, Page 232, which said last mentioned order is in words and figures as follows, to-wit:

Monday, April 19, 1915, the 12th Day of the April Term, 1915.

132 MERGENTHALER LINOTYPE COMPANY, Plaintiff,

vs.

W. B. HAYS et al., Defendants.

Now at this time for good cause shown to the court, it is hereby ordered that defendants be and they are hereby granted an extension of time for a period of ninety days from the expiration of the time last given, within which to prepare, have signed and file their Bill of Exceptions in this cause.

And now, in pursuance of the leave granted as aforesaid, and within the time allowed by the court, the defendant W. B. Hays presents to the Hon. J. P. Foard, Judge of the Thirty-third Judicial Circuit of Missouri, and as such, Judge of the Circuit Court of Butler County, and the Judge who tried said cause, this, their Bill of Exceptions in this cause, and pray that the same may be signed by the said Judge, and made a part of the record herein; which is accordingly done this 16th day of July, A. D. 1915, at Poplar Bluff, in Butler County, and State of Missouri, and within said Judicial Circuit.

J. P. FOARD, *Judge.*

O. K.

SHEPPARD, GREEN & SHEPPARD AND
ERNEST A. GREEN,
Attorneys for Defendant W. B. Hays.

O. K.

DAVID W. HILL,
Attorney for Plaintiff.

133 Endorsed "Filed July 16, 1915. Wm. McGuire, Circuit Clerk."

And said clerk also made a notation upon the record of the filing of said Bill of Exceptions.

Appellant duly filed a certified copy of the judgment and order granting an appeal in said cause in this court, and upon the record as herein set forth, the cause is pending for hearing before this court on appeal.

SHEPPARD & GREEN,
Attorneys for Appellant W. B. Hays.

134 From the Butler County Circuit Court.

Hon. J. P. Foard, Judge.

MERGENTHALER LINOTYPE COMPANY, Respondent,

—

W. B. HAYS et al., Appellants.

David W. Hill, Attorney for Respondent.
Sheppard, Green and Sheppard, Attorneys for Appellants.

STATE OF MISSOURI,
County of Butler, ss:

Be it remembered, that heretofore, to-wit; on Tuesday, January 19, 1915, the same being the 13th day of the January Term, 1915, of the Circuit Court of Butler County, Missouri, the following among other proceedings were had in said court, and entered of record:

No. 3135.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

WM. B. HAYS & SAMUEL W. DAVIS, Defendants.

Now at this time again come the parties, plaintiff and defendants in the above entitled cause, by their respective attorneys, and this cause having heretofore been submitted to the Court, a jury having been waived, and the court having heretofore heard and seen all the evidence offered, and being now fully advised in the premises all and singular, finds the issues in this cause for the plaintiff and against both defendants.

The court further finds that the defendants, Wm. B. Hays, and Samuel W. Davis, are indebted to the plaintiff in the sum of Two Thousand Eight Hundred and Fourteen Dollars and Ninety-two Cents, which includes the debt and six per cent. interest on the
135 amount named in the original petition from the date of the commencement of the suit, and six per cent. interest on the additional amount expressed in the amended petition from the date of the filing thereof to this date; and that the plaintiff is entitled to recover six per cent. interest on said indebtedness from this date.

Wherefore, it is considered, ordered and adjudged by the court that the plaintiff, Mergenthaler Linotype Company, a corporation, have and recover of and from the defendants, Wm. B. Hays, and Samuel W. Davis, the said sum of Two Thousand Eight Hundred Fourteen Dollars and Ninety-two Cents, with six per cent. interest thereon from this date, and have execution therefor.

136 STATE OF MISSOURI,
County of Butler, ss:

And afterwards, to-wit: on Wednesday, January 20th, 1915, the same being the 14th day of the January Term, 1915, the following further proceedings were had in said Circuit Court and entered of record:

No. 3135.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Plaintiff,

vs.

W. B. HAYS and SAMUEL W. DAVIS, Defendants.

Now again come the defendants by Leslie C. Green, their attorney and agent, and leave of court first had and obtained file their application and affidavit in due form for an appeal from the final judgment rendered by the court in the above entitled cause, and the court having now seen and examined said application and affidavit for an appeal, doth sustain the same, and thereupon said defendants are by the court granted an appeal to the Springfield Court of Appeals, and the appeal bond herein is by the court fixed at the sum of Five Thousand Seven Hundred Dollars, and said defendants are granted ten days from the final adjournment of this term of court within which to file said bond and the Clerk of this Court is hereby authorized and directed to approve the same; And it is further ordered by the court that said defendants have ninety days from this date within which to perfect, have signed and file their Bill of Exceptions in this cause.

137 STATE OF MISSOURI,
County of Butler, ss:

I, Wm. McGuire, Clerk of the Circuit Court within and for the County of Butler and State of Missouri, hereby certify that the above and foregoing is a full, true, and complete copy of the judgment and order granting appeal in the case of Mergenthaler Linotype Company, a corporation, vs. Wm. B. Hays and Samuel W. Davis, as fully as the same remains of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said court, at my office in Poplar Bluffs, Missouri, this 20th day of January, A. D. 1915.

[SEAL.]

WM. McGUIRE.
Clerk of Circuit Court,
By ——— ———, *Deputy Clerk.*

138 In the Springfield Court of Appeals, October Term, 1915.

No. 1509.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Respondent,

vs.

W. B. HAYS, Appellant.

Appeal from Butler Circuit Court.

Hon. J. P. Foard, Judge.

Sheppard & Green of Poplar Bluff, for Appellant.
David W. Hill of Poplar Bluff, for Respondent.

Affirmed.

FARRINGTON, *J.*:

This cause is here on the second appeal (see 182 Mo. App. 113, 168 S. W. 239). The statement made in the opinion on the former appeal sets forth the lease contract which forms the basis of the plaintiff's (respondent's) suit. In that opinion we held that the leasing of the linotype machine by defendants W. B. Hays and Samuel W. Davis from the plaintiff was a transaction embraced within the bounds of interstate commerce and not intrastate commerce and was therefore not to be fettered by the Missouri statutes requiring foreign corporations before doing business in this state to procure a license on penalty of being denied the right to enforce its contracts in our courts; and, as the judgment had been given for the defendants on the pleadings, we reversed the judgment and remanded the cause. On re-trial the plaintiff introduced evidence tending to prove the allegations of its petition and a performance of the contract of lease on its part. It showed that defendants refused to pay any rent under lease after the first year had expired, and made proof of the amount due under the lease. After the cause was remanded for a new trial defendant Hays filed an amended answer, which, after a general denial, averred that plaintiff is a foreign corporation engaged in carrying on business in the State of Missouri contrary to sections 3039 and 3040, R. S. 1909, in that it maintained
an office in the city of St. Louis where it carried on the busi-
139 ness of leasing, selling and manufacturing linotype machines and that it employed a portion of its capital and property in the linotype machines which it leased to its Missouri customers.

At the conclusion of the evidence the court sitting as a trier of the facts found the issues for the plaintiff and rendered judgment in plaintiff's favor, from which judgment the defendant Hays prosecutes this appeal contending that the evidence adduced on the second trial tends to show that plaintiff was engaged in carrying on its business in this state contrary to the statutes above mentioned.

We will briefly set forth the evidence as shown by this record. The plaintiff had in its employ a traveling salesman or solicitor whose duties required him to visit prospective customers in this state and induce them to enter into either contracts of purchase or contracts of lease. This salesman was working on a salary paid by the plaintiff and traveled in Missouri at the time this contract was made. In May, 1910, he induced the defendant Hays to enter into the contract of lease in question. It was signed by the defendants (Hays and Davis) in Missouri, but was not to become a binding contract until accepted by the proper officers of the plaintiff in the State of New York. It was forwarded to New York and by the plaintiff accepted, and under its terms a linotype machine was delivered to the defendants in the city of New York. The rent, under the terms of the lease, was payable to the plaintiff in the State of New York. The evidence shows that during the first four months of the year 1910 the plaintiff entered into eleven separate and distinct contracts in this state and leased twenty-seven separate linotype machines to customers in Missouri, and these machines were all installed during the first four months of the year 1910. It further shows that between December 1895 and January 1910 the plaintiff leased about three hundred machines in this state, all of which were installed under substantially the same kind of contract as the one sued on in this case. The evidence shows that the contract of lease in suit provides that the plaintiff would furnish a machinist to erect the machine, at the instance of the lessees. Also, that in many cases the plaintiff had sent its machinists into this state to erect and install its
140 machines, and that these machinists were in the employ of the plaintiff and were paid a salary by plaintiff. There is evidence that plaintiff also had in its employ operators of linotype machines who were to instruct the lessees how to operate the machine. It is shown that on May 12, 1910, the date of the contract of lease in suit, plaintiff had in force in this state forty-five other contracts similar to this one, and had forty-five other machines installed in Missouri, and that whenever requested plaintiff sent its machinists into this State to make repairs. It is also shown that in 1913, some three years after this contract was made, plaintiff procured a license to transact business in this state, one of the witnesses saying this was done to conform to the laws of Missouri. The plaintiff, during the ten years prior to the making of this contract, had machines installed in this state the total value of which was approximately $600,000.00.

On this evidence the defendant Hays relied for a reversal, contending that it shows or tends to show that plaintiff was carrying on business in Missouri outside the scope of interstate commerce and that what it did as above detailed evidence the fact that it was carrying on intrastate business.

Clause 4 of the lease provides that the plaintiff will furnish, at the expense of the lessees, a competent machinist to erect the machine at the place of business of the lessees and a skilled operator to instruct the lessees in its use. Clause 7 provides that the lessees will main-

tain the machine and its belongings in good condition and that they will at their own expense at once replace and repair all parts of the machine that become broken or damaged. The lease also provides that the lessor may inspect the machine at any time during the term of the lease, and the evidence disclosed that plaintiff did have in its employ inspectors who would go over the state inspecting its machines at least once every year.

The evidence we think fails (under the authorities cited in our former opinion and again cited in appellant's brief now before us) to show that the acts of the plaintiff in making this lease and in performing the terms thereof subsequent to its execution di-
141 gressed from carrying on business classified as interstate commerce, and wholly fails to evidence any fact showing that plaintiff had undertaken to carry on any local business, or intrastate commerce, in the State of Missouri. The lease and other evidence clearly shows that it was not the plaintiff that was engaged in carrying on a repair business in this state, but that it was the duty and obligation of the lessees to maintain and repair the machine, the lessor agreeing that in case repairs were necessary it would furnish skilled mechanics to the customers in Missouri whose wages and expenses would be paid by the Missouri customers. This applied not only to repairing the machine but to erecting and instructing lessees in its operation as well. It is very doubtful whether merely agreeing to furnish skilled laborers to do repair work and the like in this state under the pay and employment of the Missouri customers is a carrying on of business by the plaintiff in any sense. The whole scope and purpose of this contract was to lease the property of a citizen of one state to a citizen of another state at a stipulated rental; it was an intercourse between citizens of different states which falls within the purview of the commerce clause of the Constitution. And at most the agreement to furnish skilled men to erect and repair and instruct was only incidental to the transaction and in the nature of an inducement to the customer to enter into the contract. The case is entirely different from that of Diamond Glue Company v. United States Glue Company, 187 U. S. 611, 47 L. ed. 328, relied on by appellant. The distinction is made clear in the case of Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1, 1. c. 12, where the court said that the contract in that case was not for carrying on interstate commerce but for the doing of a local business in the State of Wisconsin. The agreement to furnish and the furnishing of skilled men to erect and repair and instruct when the lessee demanded and paid for such service was certainly not entering into any local business in Missouri. The evidence conclusively shows that the plaintiff had no office of any kind in this state, kept no storehouse for its machines or for repairs in Missouri, and did not maintain any branch agency where it kept skilled men to do work for it in the State of Missouri. In our former opinion we dis-
142 tinguished the cause relied upon by appellant herein so that it is unnecessary to go over that ground. Under the same authorities on which we heretofore held that the making of the lease was not a violation of law, we now hold that any acts done by the

plaintiff under the terms of the lease, such as are hereinbefore detailed, fail to change the character of the dealings between plaintiff and defendants from interstate to intrastate commerce. (See, also: Kansas City v. McDonald (Mo.), 175 S. W. 917.)

Appellant also contends that there is no proof that he executed the contract of lease. He is in no position to raise this point as his answer in this case clearly admits the making of the contract of lease, and the trial court was justified in finding that he signed it.

The judgment is affirmed.

Robertson, P. J., concurs.

Sturgis, J., concurs in a separate opinion.

JNO. S. FARRINGTON, *Judge.*

143 In the Springfield Court of Appeals, October Term, 1915.

No. 1509.

MERGENTHALER LINOTYPE COMPANY, a Corporation, Respondent,

v.

SAMUEL W. DAVIS, Defendant, and W. B. HAYS, Appellant.

Appeal from the Butler Circuit Court.

Hon. J. P. Foard, Judge.

Sheppard & Green for Appellant.
David W. Hill for Respondent.

STURGIS, *J.*, concurring: The contract or portion of the contract in issue here relates solely to the payment of rentals on the linotype machine imported into this state from another state by virtue of such contract. This case in no way involves any liability arising from plaintiff's inspection, care or repair of this or other like machines after its or their importation into this state. This contract of lease having for its object the importation of this machine into this state and the payment of annual rentals thereon to the owner in another state is clearly an interstate transaction and is a lawful contract free from any state law regulation, inhibiting or hampering the same. The statutes of this state, section 3037 to 3040 inclusive R. S. 1909, making it unlawful for foreign corporations to do business in this state and denying them the right to maintain suits in our courts except on compliance with conditions there specified, are, by their terms and the inhibition of the Constitution of the United States in regard to interstate commerce, limited to business other than interstate commerce. The fact that a foreign corporation, a

144 citizen of another state, may be doing business in this state in violation of our laws and thereby making itself subject to penalties and a denial of the right to enforce demands growing out of such intrastate business, does not and cannot be made to deny or curtail its right to engage in interstate commerce and to enforce

demands arising therefrom. Contracts pertaining to interstate commerce are lawful regardless of the unlawfulness of contracts made by the same foreign corporation arising from intrastate business and the penalty imposed for doing intrastate business in violation of state laws cannot be used or applied to hamper or impair interstate commerce because the latter is not subject to state control or regulation.

It is the repeated holding of the courts, in construing section 3040, supra, that foreign corporations not complying with state laws as to doing business here may nevertheless maintain suits in our courts on all lawful contracts and may enforce in such courts all demands when the enforcement of the same does not involve the enforcement of a contract made in violation of the state law; that is, the contract sought to be enforced and from which the demand arises must be itself violative of the state law regardless of other violations of law by such foreign corporation in respect to its doing business in this state. In Roeder v. Robertson, 202 Mo. 522, 538, 100 S. W. 1086, the court, in speaking on this subject, said: "It was not the intention of the Legislature to prohibit the enforcement of valid contracts made by foreign corporations in their own states with citizens of this state. There is nothing in our laws which denies the right of such corporations to enforce valid contracts, whether made in this state or not." The court thereupon applied to contracts made by foreign corporations the rule stated in Kelerher v. Henderson 203 Mo. 498, 101 S. W. 1083, that "'Unless the plaintiffs' contract by which they seek to enforce their right is infected with champerty, we see no reason why this suit may not be maintained, though such a contract exists between the defendant and the bondholders. It is time enough to turn a party out of court when he asks the aid of a court to
145 enforce such a contract. * * * The fact that certain collateral portions of the contract or transaction which is before the court are tainted with illegality, that fact will not defeat a recovery upon the other provisions of the contract, which in themselves give a complete cause of action without the assistance of the infected portions. (Vette v. Geist, 155 Mo. 27)'".

In Wulfing v. Cork Co. 250 Mo. 723, 731, 157 S. W. 615, the court says: "This demonstrates that it is not the making of a contract for performance within the state which is intended to be forbidden without regard to its nature or object, but that the inhibition is directed against the making of all contracts and the doing of all acts which constitutes the doing of business within the meaning of its terms."

In State ex rel. v. Grimm 239 Mo. 135, 181, 143 S. W. 450, it is said: "The last section (U. S. Constitution) also provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, which of course includes all of the citizens of all of the states, and the Supreme Court of the United States has repeatedly held that the latter clause includes corporations, whenever engaged in interstate commerce, or whenever legally authorized to do business in any such state or states." And again: "Both the Federal courts and this court in the cases cited, and in many more, have uniformly held that, when-

ever a non-resident or a foreign corporation has a valid cause of action under the laws of this state or under the laws of any other state, he or it may sue thereon in the courts of this state, * * * provided, further, that a citizen of this state, under its laws, is authorized to sue in our courts on a cause of action similar to the one sued on by said non-resident or foreign corporation." See also Cement Co. v. Gas Co. 253 Mo. 1, 29, 164 S. W. 468.

In United Shoe Co. v. Ramlose 231 Mo. 508, 534, 132 S. W. 1133, the court again applies to contracts made by foreign corporations the doctrine stated in Sparks v. Jasper County 213 Mo. 218, 242, 112 S. W. 265, that the court will enforce a demand aris-
146 ing from such contract provided the same can be separated from and does not involve the enforcement of a contract or provisions thereof involving business done in this state. The court further says, at page 539, that "The enforcement of a contract in the courts of this state after it has been entered into, is not doing business herein."

It seems to me, therefore, that, since the contract sued on, or at least that part of it sought to be enforced here, pertains to interstate commerce and is therefore lawful and not affected by any state law, it is immaterial whether plaintiff may have been at the time or since engaged in doing business in this state in violation of our state laws.

JNO. T. STURGIS, *Judge.*

147 In the Supreme Court of Missouri, April Term, 1917.

STATE OF MISSOURI at the Relation of W. B. HAYS, Relator,

vs.

W. R. ROBERTSON, JOHN T. STURGIS and JOHN S. FARRINGTON, Judges of the Springfield Court of Appeals, Respondents.

Certiorari.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment of the said Springfield Court of Appeals rendered on the 8th day of January, 1916, in the cause between the Mergenthaler Linotype Company, a corporation, Respondent, and W. B. Hays, Defendant-Appellant, of which said cause the said Court of Appeals assumed jurisdiction and rendered judgment as aforesaid, as appears by the transcript of the record of said Court of Appeals in said cause filed herein, be quashed and for naught held, and that the said respondents recover against the said relator their costs and charges herein expended and have execution therefor.

(Opinion filed.)

STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the April Term thereof, 1917, and on the 30th day of June, 1917, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of July, 1917.

[SEAL.] J. D. ALLEN, *Clerk.*
—— ——, *D. C.*

[Endorsed:] Supreme Court of Missouri. —— vs. ——. Mandate. Judgment.

148 In the Supreme Court of Missouri, in Banc, April Term, 1917.

No. 19361.

STATE OF MISSOURI at the Relation of W. B. HAYS, Relator,

vs.

W. R. ROBERTSON, JOHN T. STURGIS and JOHN S. FARRINGTON, Judges of the Springfield Court of Appeals, Respondents.

This is an original proceeding by certiorari to bring up to this court the record of the Springfield Court of Appeals in the case of Mergenthaler Linotype Co. v. Hays, 181 S. W. 1183. Two opinions have been written in the case by the learned Springfield Court of Appeals. [182 Mo. App. 112.] In the opinion last rendered but first above cited, references are made to the first opinion for many of the facts and for much of the law.

It is urged by relator as his ground for quashal, that the opinion of the Court of Appeals is in conflict with the case of United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, and of other cases of similar import. The point upon which the case turns is what constitutes the transaction by a foreign corporation of business in this State within the purview of sections 3037, 3039 and 3040, R. S. 1909.

The facts in the Ramlose case which we held constituted the transaction of business in this State are thus stated in the reported case.

"Said company, accordingly, about December 18, 1900, and from time to time thereafter, leased certain machines to the de-
149 fendant, including those he had formerly owned or claimed he owned. The leases contained various conditions, among which were: (1) That the machines should be used by him only in

his factory in St. Louis; (2) that he should obtain from the lessor, at prices to be fixed by it, all parts necessary to keep the machines in repair, and also any additional machinery needed; (3) that he should pay all taxes levied on the machines; (4) that he should use the machines to their full capacity; (5) that he should pay the lessor a royalty of one cent a pair for all shoes manufactured, with a rebate allowance of fifty per cent if the royalty was paid by the 15th of the succeeding month; (6) that the lessor should have the right to attach indicators to the machines to register the number of shoes manufactured, and that the lessee should keep accurate accounts of the number of shoes manufactured; (7) that if he ceased to use exclusively the machines leased to him by the company, it should have a right to take possession thereof; (8) that the lease should run seventeen years, but that the lessor should have the right to terminate it for any breach thereof or for any failure of the lessee to observe any one or more of the conditions of such lease or of any of the leases; (9) that a notice in writing sent through the mails should be sufficient to terminate such leases; (10) that the lessee acknowledged the validity of the lessor's patents; (11) that no act of the lessor should waive any of the terms of the lease, unless by instrument of writing signed by its president, vice-president or treasurer; (12) that the term 'lessor' should include the company, its successors and assigns."

The facts in the instant case as shown by the proof below which the learned Springfield Court of Appeals excerpts and briefs for us run thus:

"We will briefly set forth the evidence as shown by this record.

The plaintiff had in its employ a traveling salesman or
150 solicitor whose duties required him to visit prospective customers in this State and induce them to enter into either contracts of purchase or contracts of lease. This salesman was working on a salary paid by the plaintiff and traveled in Missouri at the time this contract was made. In May, 1910, he induced the defendant Hays to enter into the contract of lease in question. It was signed by the defendants (Hays and Davis) in Missouri, but was not to become a binding contract until accepted by the proper officers of the plaintiff in the State of New York. It was forwarded to New York and by the plaintiff accepted, and under its terms a linotype machine was delivered to the defendants in the City of New York. The rent, under the terms of the lease, was payable to the plaintiff in the State of New York. The evidence shows that during the first four months of the year 1910 the plaintiff entered into eleven separate and distinct contracts in this State and leased twenty-seven separate linotype machines to customers in Missouri, and these machines were all installed during the first four months of the year 1910. It further shows that between December, 1895, and January, 1910, the plaintiff leased about three hundred machines in this State, all of which were installed under substantially the same kind of a contract as the one sued on in this case. The evidence shows that the contracts of lease in suit provides that the plaintiff would

furnish a machinist to erect the machine, at the instance of the lessees. Also that in many cases the plaintiff had sent its machinists into this State to erect and install its machines, and that these machinists were in the employ of the plaintiff and were paid a salary by plaintiff. There is evidence that plaintiff also had in its employ operators of linotype machines who were to instruct the lessees how to operate the machine. It is shown that on May 12, 1910, the date of the contract of lease in suit, plaintiff had in force in
151 this State forty-five other contracts similar to this one, and had forty-five other machines installed in Missouri, and that whenever requested plaintiff sent its machinists into this State to make repairs. It is also shown that in 1913, some three years after this contract was made, plaintiff procured a license to transact business in this State, one of the witnesses saying this was done to conform to the laws of Missouri. The plaintiff, during the ten years prior to the making of this contract, had machines installed in this State the total value of which was approximately $600,00-.00. * * *

"Clause 4 of the lease provides that the plaintiff will furnish, at the expense of the lessees, a competent machinist to erect the ma-hine at the place of business of the lessees and a skilled operator to instruct the lessees in its use. Clause 7 provides that the lessees will maintain the machine and its belongings in good condition and that they will at their own expense at once replace and repair all parts of the machine that become broken or damaged. The lease also provides that the lessor may inspect the machine at any time during the term of the lease, and the evidence disclosed that plaintiff did have in its employ inspectors who would go over the State inspecting its machines at least once every year.

"The evidence we think fails (under the authorities cited in our former opinion and again cited in appellant's brief now before us) to show that the acts of the plaintiff in making this lease and in performing the terms thereof subsequent to its execution digressed from carrying on business classified as interstate commerce, and wholly fails to evidence any fact showing that plaintiiff had undertaken to carry on any local business, or intrastate commerce, in the State of Missouri."

The contract made between the Mergenthaler Linotype Company and Hays and Davis is not set out in the last opinion of the
152 Court of Appeals, but reference is made therein to the first opinion for the contents and provisions thereof. [182 Mo. App. 113.]

I.

Upon these facts the Court of Appeals ruled that the Mergenthaler Linotype Company was not when it made the contract with Hays and Davis on the 12th day of May, 1910, transacting business in Missouri. If this decision be opposed to what we said, or the conclusion which we reached upon similar facts (if the facts are similar) in the Ramlose case, we ought to quash the judgment of the Court of Appeals. That is the sole question to be determined.

When the matters and things transpired out of which the action between the Mergenthaler Linotype Company and Hays and Davis grew, i. e., when the contract of lease between the above parties was entered into, section 3037, supra, had been construed as to divers phases and upon divers facts by this court. [Roeder v. Robertson, 202 Mo. 522; United Shoe Machinery Co. v. Ramlose, 210 Mo. 631.] It is true that in neither one of these cases do we specifically and categorically set forth what facts and all of the facts which must be shown in order to constitute a transacting of business in this State within the purview of said section 3037. In the Roeder case the fact that the corporation from which the right which it was sought to enforce emanated, was doing business in this State contrary to the above section, was conceded by the facts agreed on. But if it be found that the facts set out in the Ramlose case are so far similar to the facts found by the learned Springfield Court of Appeals as that the same rule of law should be applied in both cases, then of course we must quash a judgment which upon similar facts
153 announces a different rule of law. Comparing the facts shown respectively in the two cases they run thus:

In the Ramlose case the articles, to-wit, patented shoe making machines, (*a*) were leased by the United Shoe Machinery Company to Ramlose for seventeen years; in the Mergenthaler case the article, to-wit, a linotype or type-casting machine was leased to Hays and Davis for six years; (*b*) in the Ramlose case the rent reserved (called therein royalty) was one cent per pair on each pair of shoes made by the lessee; in the Mergenthaler case the rent was $632.50 in cash per year, payable in advance; (*c*) the leased machines in both cases were to be used only in the respective places of business of the lessees; (*d*) all pieces or parts necessary to replace broken or worn parts were in both cases to be bought from the lessors respectively, at prices fixed by the latter; (*e*) lessees in both cases were to pay all taxes levied upon the machines; (*f*) in the Ramlose case the leased machines were to be operated to their full capacity; in the Mergenthaler case it was forbidden to operate the machine more than sixteen hours per day; (*g*) in the Ramlose case the lessor had an agent and a place of business in this State; in the Mergenthaler case lessor had an agent, but no office or place of business of any kind in this State; (*h*) in both cases the contracts were to be performed in Missouri, i. e., the leased machines were to be used in Missouri, and the lease contracts were signed by the lessees in this State and by lessors in the foreign states of their respective domicils; (*i*) it does not clearly appear in the Ramlose case how much business had been done by the lessor prior to the execution of the lease contract there in question; in the Mergenthaler case lessor had been engaged in the business of leasing type-casting *chasines* for ten years before the lease-contract in question was made and had installed in this State under similar contracts machines of the aggregate value of approx-
imately $600,000.-0; (*j*) in the Mergenthaler case skilled ma-
154 chinists, operators and inspectors were kept constantly in employ and pay of lessors for work in this State but when services were rendered by the machinists and operators in erecting,

or in giving instructions as to the operation of the leased machines such services were charged to, and were to be paid by the lessees; it does not clearly appear that such was the case in the Ramlose case, except that upon a dispute arising as to the quantity of shoes made on which royalty, or rent should be charged, the lessor insisted in naming the operators who should be hired by lessee; (*k*) in the Mergenthaler case there was given under the most stringent conditions as to time and notice of the exercise thereof, an option to purchase the leased machine after one year; in the Ramlose case there was no such option; (*l*) in the Mergenthaler case the machine was to be returned to lessor at the termination of the six-year rental period; in the Ramlose case no such provision seems to be mentioned; (*m*) in the Mergenthaler case the machine was to be insured by the lessor, but the lessees were to pay the premiums; in the Ramlose case there was no such agreement; (*n*) in the Mergenthaler case access to the machine by the agents of lessor at all reasonable times was reserved, and a waiver of landlord's lien for rent was required; there was no such agreement in the Ramlose case; and (*o*) both contracts provided in substance that the machines should remain the exclusive property of the lessor and lessees should have no property right or title in them.

Under these facts, conceded, as this court found them to be, it was held in the Ramlose case that the United Shoe Machinery Company was transacting business in this State. Was the Mergenthaler Linotype Company doing the like when it made the contract with Hays and Davis three years before it took out a license
155 to do business in this State as a foreign corporation? We think this question must be answered in the affirmative.

In some aspects the Mergenthaler case is far stronger in favor of this view than is the Ramlose case. The chief point of difference is that the Mergenthaler Company had neither an office nor a warehouse in this State. Whatever argument there may be in the fact of the maintenance of a warehouse by one and not by the other, there is no virtue in the argument of a difference based on the maintenance of an office. This for the reason that the statute itself requires that an office be maintained. Surely, no difference in favor of the Mergenthaler Company can be bottomed on its failure even to partially comply with the statute in question. As to the matter of the warehouse, it may be said that by the plainest inference repair parts and pieces only were kept in such warehouse for use upon the leased machines of the Shoe Machinery Company. Here in the Mergenthaler case $600,000 worth of personal property, to-wit, type-casting machines, belonging to the latter company were moved bodily into this State and leased out at an annual rental far in excess of that which the selling price of the machine would seem to warrant. In the one case mere repair parts and pieces were moved into the State; in the other some hundreds of type-casting machines were so moved. Moreover, the business of the United Shoe Machinery Company was not that of selling repair parts; it was that of leasing shoe-making machinery; one was merely a convenient incident to the other, its chief business.

While fully recognizing that the burden of proof was upon defendants in the case of Mergenthaler Linotype Co. v. Hays, et al., to show that the plaintiff in that case could not recover for that being a foreign corporation, it was engaged in doing business in this State without having theretofore complied with the law; yet when it was shown that this company had moved into this State prior to the making of the contract here under discussion
156 more than a half a million dollars worth of its property, which it was leasing out under contracts, we are warranted, naught else appearing, in assuming that such transactions were merely part and parcel of its usual and ordinary business. In other words, that this business done by it in this State differed in no material respect from its usual and ordinary business and from its usual and ordinary method of doing that business in the state of its domicil and in other states.

We are of opinion that any foreign corporation, without taking out a license in Missouri under sections 3037, 3039, 3040 and 3342, R. S. 1909, can under the commerce clause of the Federal Constitution, unhindered wholly by us or by the laws of this State, sell its type-casting machines or other commodities to citizens of this State under such terms as it sees fit; [Kansas City v. McDonald, 175 S. W. 917; Wulfing v. Cork Co., 250 Mo. l. c. 731,] that it can likewise sell repair parts to purchasers of its products or machines, and agree to send its skilled workmen and operatives into this State, at the expense of the users of its machines, to erect the same and teach the manner of the operation thereof. [Milan Milling Co. v. Garton, 93 Tenn. 590; Flint &c. Mfg. Co. v. McDonald, 21 S. D. 526.] But we do not think that any foreign corporation can through a period of ten years engage in this State in the business of renting out its property at an annual rent reserved, and of collecting that rent yearly throughout rental periods of six years, without complying with our statutes licensing foreign corporations. We need not lengthen these views by a recital of the reasons for requiring a foreign corporation to maintain an office and obtain a license before permitting such corporation to transact intrastate business in this State. The statute itself which so requires furnishes a sufficient reason for us. But the courts have collected some of these
157 reasons wherein the curious may read them: Vide, Roeder v. Robertson, 202 Mo. 522; Osborne v. Shilling, 74 Kan. 675.

Neither does it make any difference as between the facts in the Mergenthaler case and those in the Ramlose case, that in one a royalty in lieu of fixed rent was taken as compensation for the use of the machine, rather than a certain fixed cash sum payable annually in advance. Both are in effect rent-charges; both are doing business, though getting cash rent in advance may seem to be doing the better business. Interstate commerce, as to the particular phase confronting us, connotes trafficking transactions between citizens of different states, whereby the title of the seller in the commodity sold is transferred to the buyer, or agreed so to be upon the contingency of payment of the purchase price by instalments or otherwise. [Kansas City v. McDonald, 175 S. W. 917.] Not one wherein the property of

the quasi seller is moved bodily into this State and leased for a long term of years for an exorbitant annual rental and to be returned to such seller at the end of the rental period.

The fact that in both cases the companies charged with transacting business in this State had resident agents here, proves nothing. Agents, like transportation companies, are mere instrumentalities of commerce. Each is a necessity of commerce common to both intrastate and interstate commerce, and so factors which in nowise differentiate the one sort of commerce from the other. In interstate commerce the delivery of the commodity to the purchasing citizen of another state may be either in the domicil of the vendor or of that of the vendee; it may be for cash, or on time, by giving credit and taking back security, by payment in full or by instalments, but if the title to the commodity does not pass, and is not to pass, certainly the business is not traffic; it is not buying and selling. It is but the bringing of the property of the foreign corporation into this
158 State and so dealing therewith after it is in the State as to make of such property a source of income to the foreign corporation. In short, it is a continued dealing by the foreign company with the property in this State after interstate commerce has wholly ceased its dealings therewith. If such acts do not constitute transacting business in this State it is difficult to conceive what would be necessary in order for a foreign corporation to transact business here. Nor does the fact that a studied effort to give to the transactions a false color of interstate commerce, in any way change this view.

II.

Concerning the further point urged by relator that there is no proof in the record that he executed the contract of lease, it suffices to say that this point is so answered by the learned Court of Appeals as to leave nothing further for us to say about it. They rule that relator "is in no position to raise this point as his answer in this case clearly admits the contract of lease and the trial court was justified in finding that he signed it." This is unquestionably good law.

We are of the opinion upon the other point however that the judgment of the Springfield Court of Appeals is in conflict with the case of United Shoe Machinery Co. v. Ramlose, supra, and that the judgment rendered by that court on the 8th day of January, 1916, in the case of Mergenthaler Linotype Co. v. Hays et al., should be quashed and for naught held. Let this be done. All concur, except Bond, J., who dissents.

C. B. FARIS, *Judge.*

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of said Court, delivered in the foregoing entitled cause, on the 30" day of June, 1917, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court. Done at office in the City of Jefferson, State aforesaid, this 25" day of July, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk*,
By G. E. SILVERS, *D. C.*

159 Springfield, Missouri, March 11, 1918.

The Springfield Court of Appeals convened pursuant to adjournment, and there are now present Hon. John T. Sturgis, Presiding Judge, Hon. John S. Farrington, Judge, Hon. John H. Bradley, Judge, Leslie D. Rice, Marshal, and Frances P. Daniel, Clerk, when the following proceedings were had, to-wit:

1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

vs.

W. B. HAYS et al., Appellants.

Now again come the parties aforesaid, by their respective attorneys, and the Court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said Circuit Court of Butler County be reversed, annulled and for naught held and esteemed; that the said appellants be restored to all they have lost by reason of the said judgment; that the said appellants recover of the said respondent costs and charges herein expended, and have execution therefor.

Opinion filed.

160 Mar. 11, 1918.

In the Springfield Court of Appeals, October Term, 1917.

No. 1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

v.

W. B. HAYS, Appellant.

Certified from Supreme Court with Mandate for Decision.

FARRINGTON, *J.*:

This controversy first came to this court on an appeal involving a question of pleading and was decided June 27, 1914, our opinion being reported in 182 Mo. App. 113, 168 S. W. 239. The statement of the case in that opinion is as follows:

"The plaintiff is a New York corporation and at the time of making the contract and lease—the basis of this suit—had not complied with sections 3037 to 3041 inclusive, R. S. 1909, providing for foreign corporations doing business in Missouri and prescribing penalties. The penalty particularly involved in this case is that denying a foreign corporation, doing business in this state without having complied with these sections of the law, the right to maintain an action in our courts arising out of contract or tort.

"The plaintiff alleged that it is engaged in the manufacture, sale and distribution of linotype machines; that there is due it $1,265, representing two annual rental charges of $632.50 each, payable in advance on the fourteenth day of June for the years 1911 and 1912; that the defendants are the owners and proprietors of the Citizen-Democrat, a publishing company in Poplar Bluff, Mo.; that the lease was for a term of six years commencing in June, 1910; that the first year's rent, beginning June 14, 1910, had been paid, and that after demand for the payment of the rent for the two years named, it was refused. Plaintiff further alleged that pursuant to the contract it shipped the machine to Poplar Bluff and set it up in perfect working order, and that plaintiff fully performed its contract.

"The defendant Hays answered by a general denial, and the following plea:

" 'Further answering, this defendant states that the plain-
161 tiff, the Mergenthaler Linotype Company, at the time of the execution of the contract and lease set out in plaintiff's petition, was and is still a foreign corporation, incorporated, organized and existing under the laws of the State of New York; and that said corporation is a corporation organized for pecuniary profit, and as such has not complied with the laws of the State of Missouri relating to foreign corporations, in this: That said Mergenthaler Linotype Company of New York had not at the time of the making of this contract and at the time of bringing this suit, filed with the Secretary of State of the State of Missouri, a copy of its articles of association and charter granted by the State of New York, and had not then procured from the Secretary of State a license to do business in the State of Missouri.

" 'Defendant further states that the Mergenthaler Linotype Company of New York, not having complied with the laws of this state regulating foreign corporations as aforesaid, and not having received a certificate for a license from the Secretary of State authorizing it to do business in this state as aforesaid, it was and is unlawful for said corporation to transact business in this state without a compliance with the statute in such cases made and provided, and that the contract and lease referred to in plaintiff's petition is unlawful and void, and plaintiff cannot maintain this suit.' "

"The plaintiff replied as follows:

" 'Plaintiff admits that it was at the time of the execution of the contract and lease set out and referred to in plaintiff's petition and now is a foreign corporation organized and existing under the laws of the State of New York, and that it was organized for pecuniary profit.

" 'Plaintiff denies that at the date of said contract and lease it had

not complied with the laws of the State of Missouri relating to foreign corporations.

" 'Plaintiff admits that at the time of the making of the contract and lease set out in its petition it had not filed with the Secretary of State of Missouri a copy of its articles of association and charter granted by the State of New York. Also admits that at the time of the making of the contract and lease referred to it had not
162 filed with the Secretary of State of the State of Missouri a copy of its articles of association and charter granted by the State of New York. Also admits that at the time it had not procured from the Secretary of State a license to do business in the State of Missouri. Further replying to said amended answer this plaintiff states: That at the time of the execution of the contract and lease referred to in its peti ion it was not doing business in the State of Missouri, nor did it keep an office in said state for the purpose of transacting its business authorized to be transacted by its charter and articles of incorporation. That at the time of the making of said contract and lease plaintiff had a salesman traveling in Missouri soliciting persons to buy the linotype machine mentioned in plaintiff's petition. That the said traveling salesman employed by plaintiff at that time made the contract and lease referred to in plaintiff's petition with these answering defendants, W. B. Hays and S. W. Davis, subject to the approval and ratification of plaintiff at its office in New York. That said contract and lease referred to was agreed to, approved and executed by plaintiff at its office in New York on the date it bears; that plaintiff's salesman in Missouri presented its contract and lease to these answering defendants who executed the same and that said linotype machine was delivered to these answering defendants W. B. Hays and S. W. Davis. Plaintiff alleges it did not open an office in Missouri, for the transaction of business until the first of January, 1913.' "

"Thereafter a motion for judgment on the pleadings was filed, alleging the following grounds:

" 'First. Because it appears from the allegations in plaintiff's replication filed herein that the plaintiff is not entitled to recover in this case.

" 'Second. Because, upon the pleadings filed in this case, judgment should properly be awarded the defendant, W. B. Hays, herein.' "

"This motion was sustained and judgment entered, from which judgment this appeal is prosecuted.

"Both parties rely upon so many of the contract provisions as sustaining their respective positions that we find it necessary to burden this statement with a copy of the contract. It follows:

" 'This agreement, made and entered into this twelfth day of May, 1910, by and between Mergenthaler Linotype Company,
163 a body corporate, organized and existing under the laws of the State of New York, hereinafter designated the lessor, of the first part, and William B. Hays and Samuel S. Davis, copartners, of Poplar Bluff, Missouri, proprietors of the Citizen-Democrat, hereinafter designated the lessees, of the second part:

" 'Witnesseth, That for and in consideration of the mutual covenants, obligations and considerations hereinafter mentioned, the respective parties hereto have agreed and do hereby agree together as follows:

" 'First. The lessor agrees to deliver to the lessees on the terms and conditions hereinafter named: One (1) Two-letter Linotype Machine, Model 5 No. 14,088, and One Two-letter Duplex Equipment.

" 'Second. The lessor agrees that said machine shall be in operative condition and capable of setting, when operated by an expert, at least 5,000 ems nonpariel per hour.

" 'Third. The lessor agrees that after the receipt of the first year's rental, as hereinafter provided, delivery of said machine, its belongings and accessories, shall be made to the lessees f. o. b. City of New York.

" 'Fourth. The lessor agrees that it will, if so requested, furnish at the expense of the lessees, a competent machinist to erect said machine at the place of business of the lessees, and a skilled operator to instruct the employees of the lessees in the use of the machine.

" 'Fifth. The lessees agree to accept said machine, its belongings and accessories, at the factory of the lessor, Borough of Brooklyn, City of New York, and cause them to be at once transported to and erected in a safe and suitable location in their place of business, No. 220 South Fourth Street, Poplar Bluff, Missouri, and to pay the wages and expenses of machinists and operators, including the time and amounts necessarily spent by them in traveling, and all freights upon the machine, its belongings and accessories, from the City of New York, to Poplar Bluff, Missouri, and to pay the lessor for said machine, its belongings and accessories, yearly and in advance, during the whole of the term herein provided for, the annual rental of Six hundred thirty two and 50/100 dollars ($632.50) (New York exchange); said rental for the first year to be due and pay-
164 able as soon as the said machine is ready for delivery and before delivery of same is made. The period, however, to which the first year's rental shall apply shall commence thirty days after the date at which said machine is ready for delivery; the object of said allowance of thirty days without rental being to give the lessees time in which to transport the said machine to, and to erect it in, their place of business aforesaid and to become familiar with its use.

" 'Sixth. The lessees agree that should a promissory note or notes be at any time accepted by the lessor instead of cash or New York exchange for said rental or any part thereof, only payment of said note or notes shall be payment of said rental, and upon default in the payment of any of said notes, or upon the failure of the lessees to perform any other of the covenants, conditions or obligations of this agreement, or if the lessees shall become bankrupt or insolvent, or shall part with the machine without the consent of the lessor, either by their own act or by operation of law, the lessor may at its option terminate this agreement by notice in writing and take possession of and remove said machine, its belongings and accessories, and all

moneys theretofore paid shall belong to the lessor, and the lessees shall have no claim for the return of the same or any part thereof.

"'Seventh. The lessees agree that they will maintain the said machine, its belonging and accessories, in good and operative condition, and to that end will cause the same to be cared for by a competent man and at their own expense and at once replace and repair all such parts of said machine, its belongings and accessories, as may be broken, worn out or damaged; and that the said machine shall not be operated more than sixteen hours per day; and that they will allow the agents of the lessor access to said machine at all reasonable times, and that they will, whenever so requested, furnish to the lessor a waiver of landlord's lien upon said machine its belongings and accessories.

"'Eighth. The lessees agree that they will not remove the said machine, itts belongings and accessories, or any part thereof, from their said place of business without the consent in writing of the lessor, and that they will not assign, mortgage, transfer, underlet or part with the possession of the same, or any part thereof, or any interest therein, either directly or indirectly, and that they will not do or permit to be done anything whereby they or any part thereof shall or may be seized, taken in execution, attached, removed, destroyed or injured.

"'Ninth. The lessees agree that they will pay, bear and discharge all taxes that may be charged, assessed or imposed upon the said machine, its belongings and accessories, or any part thereof, or any valuation thereof, during the term of this lease, and vill pay to the said lessor, in addition to the rental hereby reserved, the cost of insuring said machine, its belongings and accessories, during the whole of the term herein provided, against loss or damage by fire to the amount of $1150.00 for the benefit of the lessor, the premium for such insurance, however, not to exceed the local ruling rate at Poplar Bluff, Missouri, and to be paid by the said lessees to the said lessor upon demand.

"'Tenth. It is mutually understood and agreed that this lease is made for the term of six years, but if the lessees shall desire to discontinue the use of said machine at the end of the first year, they shall have the right to do so, provided that they shal have given the lessor notice in writing to that effect thirty days before the expiration of the said first year, and provided further that they shall, at the end of said first year, have caused said machine, its belongings and accessories, to be properly boxed and delivered f. o. b. at Poplar Bluff, Missouri, addressed to the lesser, Borough of Brooklyn, City of New York, or as the lessor may direct, without chage or cost to the lessor; otherwise (unless the lessees shall have exercised the option of purchase hereinafter provided for) this lease shall continue in force and be binding upon both parties hereto to the end of the sixth year, subject to the annual payment by the lessees to the lessor of $632.50 at the beginning of each year, and to all the terms and conditions of this agreement, and at the end of said period of six years said machine, its belongings and accessories, shall be returned

by the lessees to the lessor by delivery as above provided, without cost or charge to the lessor.

" 'Eleventh. The lessees further agree that unless they shall have purchased the said machine from the lessor, or unless and until they shall have returned the same to the lessor in the manner hereinbefore provided, they will continue to pay to the lessor the
166 annual rental of $632.50 at the beginning of each year, and all the covenants and obligations of the lessees under this agreement shall continue in full force and effect.

" 'Twelfth. It is distinctly understood and agreed between the parties hereto, that this instrument is not to be considered in any sense a bill of sale or evidence of a conditional sale, and that the entire right, title and interest of every kind in and to the said machine, its belongings and accessories, is now and is to remain in the lessor until the lessees shall have exercised the option of purchase and shall have fully completed the purchase as hereinafter provided.

" 'Thirteenth. In case the lessees shall have paid said first year's rental in full as herein provided, and shall have paid the lessor for such repairs as it shall have made upon said machine and for such parts and supplies as it shall have furnished for its use, and shall also have performed all of the other covenants, conditions and obligations of this instrument by said lessees to be performed, and then only, said lessees shall have the right to purchase said machine, its belongings and accessories, from said lessor by the payment to the said lessor of the sum of Twenty-six hundred eighty-two and 50/100 dollars ($2682.50), but such right of purchase may be exercised by said lessees only in case said lessees shall, within eleven months from the date of the delivery of the machine as aforesaid, have given said lessor notice in writing of the intention of said lessees to make said purchase, and in the event of such purchase and payment within thirteen months from the date of the delivery of the machine as aforesaid then, and not otherwise, the legal title to said property shall pass to said lessees and this lease shall cease and determine.

" 'It is, however, expressly agreed that the right of purchase hereinabove provided for shall not be exercised by any person or party other than the said lessees, and that until the purchase and payment hereinabove provided for shall have been completed, made and performed, the entire right, title and interest of every kind in and to said property shall remain in said lessor, subject only to the right of said lessees to use said machine as lessees, and not as purchaser.

" 'Fourteenth. The lessees shall, when thereunto requested by said Mergenthaler Linotype Company, forthwith execute and
167 deliver to said Mergenthaler Linotype Company such new agreement, in form to be approved by said Mergenthaler Linotype Company, or such other statement, affidavit, instrument or assurance as may by said Mergenthaler Linotype Company be deemed proper and necessary to continue and protect its ownership and control of the property hereby leased.

" 'Fifteenth. The lessor, by reason of its interest that said machine, its belongings and accessories, may remain in perfect condition

and maintain their reputation, agrees that it will furnish the lessees with any and all spacers, matrices, parts or other supplies required for use on or in connection with said machine, its belongings and accessories, at prices not exceeding its published list prices, and the said lessees agree that they will, during the existence of this agreement, purchase said spacers, matrices, parts or other supplies required for use on or in connection with said machine, its belongings and accessories, for the lessor or its agents, only.

"'Sixteenth. The lessor is authorized to enter in this lease the factory number of the machine named herein after said lease has been executed.

"'In Testimony Whereof, this agreement has been executed by the parties hereto.

"'MERGENTHALER LINOTYPE COMPANY,
"'By NORMAN DODGE,
Second Vice-President.
"'W. B. HAYS, [SEAL.]
"'SAMUEL W. DAVIS. [SEAL.]

"'Attest:
[SEAL.] J. W. HEARD,
Assistant Secretary.

Upon the foregoing statement of facts we held as follows:

"The question as to what constitutes an interstate transaction, and that relating to the lack of power in the State to impose burdens upon or fetter such commerce, have been so thoroughly discussed already that we shall merely cite some of the cases that are controlling which we think clearly hold that the transaction we have under consideration upon the pleadings was interstate business and therefore not to be fettered by the local State laws. (See: Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed. 1; International Tex-Book Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493;
168 Buck Stove & Range Co. v. Vickers, 226 U. S. 204, 57 L. Ed. 189; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. Ed. 1137, 1139; Robbins v. Taxing District of Shelby County, 120 S. W. 489, 30 L. Ed. 694; Philadelphia & Southern Mail Steamship Co. v. Commonwealth of Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200; Crutcher v. Commonwealth of Kentucky, 141 U. S. 47, 35 L. Ed. 649; Lyng v. People of the State of Michigan, 135 U. S. 161, 34 L. Ed. 150; State ex rel. Pacific Mut. L. Ins. Co. v. Grimm, 239 Mo. l. c. 182, 143 S. W. 483; International Text-Book Co. v. Killespie, 229 Mo. 397, 129 S. W. 922; Corn Products Mfg. Co. v. Western Candy & Bakers Supply Co., 156 Mo. App. l. c. 116, 135 S. W. 985; Koenig v. Boat Mfg. Co., 155 Mo. App. 685, 135 S. W. 514; Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511; Lehigh Portland Cement Co. v. McLean (Ill.), 92 N. E. 248; Chicago Crayon Co. v. Rogers (Okla.), 119 Pac. 630; Vulcan Steam Shovel Co. v. Flanders, 205 Fed. 102.) In the case last cited it is said: 'The lease between Jones

and the plaintiff and the bringing of the shovel into this State was interstate commerce.

The court is satisfied that this sale to the defendant stands on no different basis than it would if the original shipment to Jones had been on a contract of sale which for some reason had been forfeited, instead of on a contract for lease, referring to some of the cases hereinbefore cited.

"We see no distinction between a contract of lease, a contract of factorage, and a contract of sale, so far as the transaction under which the articles are dealt with is to be classified as interstate or intrastate. The mere ownership of personal property by a foreign corporation is not prohibited under the Missouri law. It is a doing of business in Missouri with that property that the statutes are designed to reach. As to such property standing idle the foreign corporation would be required to pay taxes, would be permitted to protect it by insurance, and would be permitted to commence an action for the recovery of possession of the same provided it was denied possession by wrongful act of another. (See United Shoe Machinery Co. v. Ramlose, 231 Mo. 508, 132 S. W. 1133.)

"The case of United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567, is clearly distinguishable from the case at bar. The plaintiff in that case maintained a place of business in St.
169 Louis, Mo., kept its stock, property and assets there, employed an agent to look after its business in Missouri, and employed its machines by lease in manufacturing for which it was to collect a royalty on every pair of shoes manufactured. It was organized to carry on that business under the laws of Massachusetts, and was actually prosecuting such business in Missouri by its agent and office and place of business in this State. No such condition prevailed in our case according to the allegations of the pleadings. The same distinction prevails in Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 47 L. Ed. 328; Amalgamated Zinc and Lead Co. v. Bay State Zinc Min. Co., 221 Mo. 7, 120 S. W. 31; Fay Fruit Co. v. McKinney Bros. & Co., 103 Mo. App. 304, 77 S. W. 160; and other cases cited by respondent.

"As we view the business done by the parties to this lease, it was purely an interstate transaction in its character and therefore not subject to the control of the sections of the Missouri statutes in question, and therefore plaintiff should not have been denied the right to maintain its action in our courts."

We reversed that judgment and remanded the cause, and on retrial in the circuit court judgment went for the plaintiff. An appeal was taken and we affirmed that judgment, our opinion being reported in 181 S. W. 1137, in which we held, on the same state of facts so far as the question of interstate business was concerned, that this transaction came under the provisions of the federal act relating to interstate commerce, and that the plaintiff was entitled to recover; and further held—which holding was suggested by Sturgis, J., in a concurring opinion—that although a foreign corporation has not complied with the state laws as to doing business it may nevertheless maintain suits in our courts on all lawful contracts and may enforce them when the enforcement does not involve a contract made

in violation of the state laws; that is, the contract itself must be violative of the state laws and unless it is it will be enforced even though there have been other violations of law by such foreign corporation in respect to doing business in the state, citing Roeder v. Robertson, 202 Mo. 522, 538, 100 S. W. 1086, 1090; Kelerher v. Henderson, 203 Mo. 498, 101 S. W. 1083; Wulfing v. Cork Co., 250 Mo. 723, 730, 157 S. W. 615, 617; State ex rel. v. Grimm, 239 Mo. 135, 181, 143 S. W. 483, 497; and Cement Co. v. Gas Co., 255
170 Mo. 1, 29, 164 S. W. 468, Ann. Cas. 1915 C, 151.

The appellant (defendant Hays) thereupon brought a certiorari proceeding in the Supreme Court of Missouri which proceeding was entertained by said court and resulted in the quashing of the judgment of this court, above referred to, our opinion being declared in conflict with the opinion of the Supreme Court of Missouri in the case of United Shoe Machinery Co. v. Ramlose, 210 Mo. 631, 109 S. W. 567; and the Supreme Court in its opinion in the certiorari proceeding (State ex rel. Hays v. Robertson et al., 271 Mo. 475, 196 S. W. 1132) held that the transaction did not constitute interstate business, and that the plaintiff having failed to comply with the foreign corporation statutes of Missouri was barred from recovering.

Even if this court was and still is of the opinion that this plaintiff corporation was engaged, in this transaction, in interstate business, and that in rendering its decision affirming the judgment of the trial court in favor of the plaintiff it was following the latest federal authorties on this question, yet under the Constitution of our State we are required to follow the last ruling opinion of our Supreme Court and for that reason the judgment of the trial court is reversed. Sturgis, P. J. concurs. Bradley, J., concurs in the result, expressing no opinion as to the law.

JNO. S. FARRINGTON, *Judge.*

171 In the Springfield Court of Appeals, March Term, 1918.

#1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

vs.

W. B. HAYS, Appellant.

Motion for Rehearing.

Now comes Mergenthaler Linotype Company, a corporation, Respondent in the above entitled cause, and moves the court to set aside its judgment and decision, reversing the judgment of the Butler Circuit Court, and to grant Respondent a rehearing of said cause, for the reasons and upon the grounds following, to wit:

First.

Because this Court, in reversing the judgment in this cause erred for the reason that the acts done by the Respondent, as shown by the

record in this cause, were acts done in Interstate Commerce, and therefore not within the purview of Sections 3037 to 3040 inclusive, and Section 3342 of the Revised Statutes of Missouri, 1909.

Second.

Because this Court in reversing the judgment in this cause erred for the reason that the acts done by the Mergenthaler Linotype Company as shown by the record in this cause were acts done in interstate commerce and not subject to State regulation in view of that clause of the eighth Section of Article One of the Constitution of the United States, which provides as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

Third.

Because this Court in reversing the judgment in this cause erred for the reason that its determination that a transaction of lease
172 under the facts shown by the record in this cause is not a transaction in interstate commerce abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

Fourth.

Because this Court in reversing the judgment in this cause erred for the reason that its determination that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909, prevented the Mergenthaler Linotype Company, under the facts shown by the record in this cause, from leasing property in the State of New York to be used in the State of Missouri, amounted to a State regulation of interstate commerce repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

Fifth.

Because this Court in reversing the judgment in this cause erred, for the reason that its determination, under the facts shown by the record in this cause, that unless there were a passing of title to the article dealt in, a transaction could not amount to interstate commerce, abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall

have power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

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Sixth.

Because this Court in reversing the judgment in this cause erred, for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909, and also the opinion and judgment of this Court in the application and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

Seventh.

Because this Court in reversing the judgment in this cause erred, for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri 1909 and also the opinion and judgment of this Court in the application and construction of said statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Fifth Amendment to the Constitution of the United States which provides as follows: "No person shall be deprived of life, liberty or property without due process of law."

Eighth.

Because this Court in reversing the judgment in this cause erred, for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri 1909 and also the opinion and judgment of this Court in the application and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the First Section of the Fourteenth Amendment to the Constitution of the United
174 States which provides as follows: "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ninth.

Because this Court in reversing the judgment in this cause erred, for the reason that Sections 3037-3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909 and also the opinion and judgment of this Court in the application and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Tenth Section of Article One of the Constitution of the United States which provides as follows: "No State shall pass any law impairing the Obligation of Contracts."

Tenth.

Because this court in reversing judgment herein rendered by the Butler Circuit Court, deprives Plaintiff in Error of its right, privilege and immunity to engage in Interstate Commerce under the law, all in violation and contravention of the Fourteenth Amendment of the Constitution of the United States.

(Signed) MERGENTHALER LINOTYPE COMPANY,
By ABBOTT & EDWARDS,
Its Attorneys.

175 Springfield, Missouri, March 30th, 1918.

The Springfield Court of Appeals convened pursuant to adjournment and there are now present Hon. John T. Sturgis, Presiding Judge, Hon. John S. Farrington, Judge, and Hon. John H. Bradley, Judge; Leslie D. Rice, Marshal, and Frances P. Daniel, Clerk, when the following proceedings were had, to-wit:

No. 1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

vs.

W. B. HAYS et al., Appellant.

Now at this day, the Court having fully considered the said Respondent's motion for a rehearing of this cause, doth overrule the same.

176 In the Springfield Court of Appeals of the State of Missouri.

No. 1509.

MERGENTHALER LINOTYPE COMPANY (a Corporation), Plaintiff-respondent,

v.

SAMUEL W. DAVIS, Defendant, and W. B. HAYS, Defendant-appellant.

Petition of Mergenthaler Linotype Company, a Corporation, for a Writ of Error from the Supreme Court of the United States to the Springfield Court of Appeals of the State of Missouri.

Abbott & Edwards, David W. Hill, Attorneys for Petitioner.

Filed June 3, 1918. Ben. M. Neale, Clerk, per F. P. D.

177 In the Springfield Court of Appeals.

No. 1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

vs.

SAMUEL W. DAVIS, Defendant, and W. B. HAYS, Defendant, Appellant.

Petition of Mergenthaler Linotype Company for Writ of Error from the Supreme Court of the United States to the Springfield Court of Appeals of the State of Missouri.

To the Honorable John S. Farrington, Presiding Justice of the Springfield Court of Appeals:

Your Petitioner, Mergenthaler Linotype Company, Respondent in the above entitled cause, respectfully shows that on the 19th day of January, 1915, in the Circuit Court of Butler County, Missouri, it instituted an action at law against Sam W. Davis and W. B. Hays, as defendants, for the sum of Two Thousand Six-Hundred Thirty two and thirty-five one hundredths ($2,632.35) Dollars, and interest, of which amount Two Thousand Five Hundred Thirty ($2,530.00) Dollars, was due as rental on a linotype machine, and One Hundred Two and thirty-five one-hundredths ($102.35) Dollars, insurance premiums advanced on same under a written contract described in plaintiff's petition, said contract being dated May 12th, 1910. That thereafter, on the pleadings in said cause, judgment was entered in favor of defendant Hays.

That from said judgment, the Mergenthaler Linotype Company, petitioner herein, perfected an appeal to the Springfield Court of Appeals of the State of Missouri, said appeal being to the March term, 1914, of said court, and numbered 1220.

178 That thereafter, on June 27th, 1914, the Springfield Court of Appeals reversed said cause and remanded it to the Circuit Court of Butler County for further procedure, the opinion being reported in Volume 182 of the Missouri Appeal Reports, Page 113.

That thereafter, on the 5th day of October, 1914, the said Mergenthaler Linotype Company filed an amended petition, in which it pleaded, among other things, that on the 12th day of May, 1910, it entered into a written contract with Samuel W. Davis and W. B. Hays one linotype machine at an annual rental of $632.50, and under the terms of which the said Samuel W. Davis and W. B. Hays agreed to pay to said Mergenthaler Linotype Company in addition to the annual rental, the cost of insuring said machine.

That said contract was attached as an exhibit to said petition.

That said Mergenthaler Linotype Company had performed all of the conditions and terms on its part to be performed, and that there remained due from Samuel W. Davis and W. B. Hays, to Mergenthaler Linotype Company, the sum of $2,632.35.

Your petitioner further respectfully shows:

That by the answer filed by defendant in said cause, said defendant, W. B. Hays, denied each and every allegation in said petition contained, and set up and pleaded the following affirmative defenses:

"Further answering, this defendant states that the plaintiff, Mergenthaler Linotype Company, was on the 12th day of May, 1910, and is now a foreign corporation, incorporated, organized and existing under and by virtue of the laws of the State of New York, for pecuniary benefit.

"Further answering, this defendant alleges that on the 12th day of May, 1910, the date of the making of the alleged agreement set out in plaintiff's petition, and for a long time prior thereto, and thereafter, the said plaintiff, Mergenthaler Linotype Company, was engaged in the transaction of business in the State of Missouri,
179 in this, to-wit: that said plaintiff had and maintained an office in the City of St. Louis, where it carried on the business of leasing, selling and manufacturing linotype machines; that on said 12th day of May, 1910, said plaintiff had in force in the State of Missouri, various leases and contracts, all of which presupposed the employment of a portion of the capital stock of said plaintiff corporation, in the State of Missouri.

"Further answering, defendant alleges that notwithstanding the fact that said plaintiff was, on the 12th day of May, 1910, and had been for a long time prior thereto, engaged in transacting business in the State of Missouri, as hereinbefore pointed out, that nevertheless said plaintiff, Mergenthaler Linotype Company, on said 12th day of May, 1910, and at the time of the beginning of this suit, had not complied with the corporation laws of the State of Missouri, relating to foreign corporations, in this, to-wit: that said plaintiff, Mergenthaler Linotype Company, a foreign corporation of New York, had not at the time of the making of the alleged contract set out in plaintiff's petition, and at the time of the bringing of this suit, filed with the Secretary of State, of the State of Missouri, a copy of its Articles of Association and Charter granted by the State of New York, and had not then procured from the Secretary of State a license to do business in the State of Missouri; all in violation of the provisions of Sections 3039-3040 Revised Statutes of Missouri, 1909.

"Defendant further states that the plaintiff's not having complied with the Laws of this State, relating to foreign corporations as aforesaid, and not having received a certificate or license from the Secretary of State, authorizing it to do business in this State as aforesaid, it was and is unlawful for said corporation to transact business in this State, and that, therefore, the contract and lease referred to in plaintiff's petition is illegal and void, and any cause of action on the same is barred by the provisions of Sections 3039-3040 Revised Statutes, 1909; which said Sections this defendant pleads in bar of the cause of action set up in plaintiff's petition."

That said Mergenthaler Linotype Company denied the allegations in said answer and prayed for judgment in accordance with its petition.

That it was the contention of said Mergenthaler Linotype Company, in the trial of said cause, and before the Springfield Court of Appeals of Missouri, that the Statutes of the State of Missouri, upon which defendant's plea was granted, were, when applied in a case like this, repugnant to the Commerce Clause of the Constitution of the United States, to Section 8 Article I of said Constitution, and to the 14th Amendment thereto, calculated to deprive petitioner of property without due process of law, and against the right,
180 privilege and immunity guaranteed to said Mergenthaler Linotype Company by the Constitution and said Amendment thereto.

That thereafter, the Circuit Court of Butler County rendered a judgment in favor of said Mergenthaler Linotype Company against defendant for $2,814.92.

That thereafter defendant appealed said cause to the Springfield Court of Appeals.

That in the Springfield Court of Appeals, said Mergenthaler Linotype Company renewed its contentions with reference to the unconstitutionality of the Statutes of Missouri upon which defendant based his defense, and its right and privilege under the Constitution of the United States and Amendments thereto.

That the question of the validity of Sections 3037 to 3040 inclusive, and 3342, Revised Statutes of Missouri, 1909, was drawn in question in the said Springfield Court of Appeals, on the ground that said Statutes and each of them, when applied to a case like this, were repugnant to the Commerce Clause of the Constitution of the United States, to Section 8, Article 1, of said Constitution, and to the Fourteenth Amendment to the Constitution of the United States, and repugnant to the right, privilege and immunity guaranteed to the said Mergenthaler Linotype Company under said Constitution and Amendments thereto, but the decision of the Springfield Court of Appeals of Missouri, was in favor of the validity of the Missouri Statutes aforesaid, and against the contentions of petitioner herein and against said right, privilege and immunity.

The Springfield Court of Appeals affirmed that judgment, their opinion being reported in 181 S. W. 1183 in which the court held, on the same state of facts so far as the question of interstate business was concerned, that this transaction came under the provisions of the federal act relating to interstate commerce, and that the plaintiff was entitled to recover; and further held—which holding was suggested by Sturgis, J., in a concurring opinion—that although a foreign corporation has not complied with the state laws as to doing business it may nevertheless maintain suits in Missouri courts on all lawful contracts and may enforce them when the enforcement does not involve a contract made in violation of the state laws, that is, the contract itself must be violative of the state laws, and unless it is it will be enforced even though there have been other violations of law by such foreign corporation in respect to doing business in the State.

The appellant (defendant Hays) thereupon brought a certiorari proceeding in the Supreme Court of Missouri which proceeding was

entertained by said court and resulted in the quashing of the judgment of the Springfield Court of Appeals above referred to, the opinion being declared in conflict with the opinion of the Supreme Court of Missouri in the case of United Shoe Machinery Co. vs. Ramlose, 210 Mo. 631, 109 S. W. 567; and the Supreme Court in its opinion in the certiorari proceeding (State ex rel. Hays v. Robertson et al., 271 Mo. 475, 196 S. W. 1132) held that the transaction did not constitute interstate business, and that the plaintiff having failed to comply with the foreign corporation statutes of Missouri, was barred from recovering.

That thereafter, on the 11th day of March, 1918, said Springfield Court of Appeals rendered and entered of record, a final order and judgment reversing the decision and judgment of the Butler County Circuit Court, and in so doing decided against the right, privilege and immunity this especially set up and claimed by the petitioner, its opinion stating in part as follows:

181 "Upon the foregoing statement of facts we held as follows:

'The question as to what constitutes an interstate transaction, and that relating to the lack — power in the State to impose burdens upon or fetter such commerce, have been so thoroughly discussed already that we shall merely cite some of the cases that are controlling which we think clearly hold that the transaction we have under consideration upon the pleadings was interstate business and therefore not to be fettered by local state laws. (Citing cases.)'

* * * * * * *

'As we view the business done by the parties to this lease, it was purely an interstate transaction in its character and therefore not subject to the control of the sections of the Missouri Statutes in question, and therefore, plaintiff should not have been denied the right to maintain its action in our courts.'

* * * * * * *

"* * * We held, on the same state of facts so far as the question of interstate business was concerned, that this transaction came under the provisions of the Federal Act relating to interstate commerce, and that the plaintiff was entitled to recover; and further held * * * that although a foreign corporation has not complied with the State laws as to doing business it may nevertheless maintain suits in our courts on all lawful contracts and may enforce them when the enforcement does not involve a contract made in violation of the State laws; that is, the contract itself must be violative of the State laws and unless it is, it will be enforced even though there have been other violations of law by such foreign corporation in respect to doing business in this State."

* * * * * * *

"Even if this court was and still is of the opinion that this plaintiff corporation was engaged in this transaction, in interstate busi-

ness, and that in rendering its decision affirming the judgment of the trial court in favor of the plaintiff it was following the latest Federal Authorities on this question, yet under the Constitution of our State we are required to follow the latest ruling opinion of our Supreme Court and for that reason, the judgment of the trial court is reversed."

And petitioner shows that the said judgment and decision and interpretation were and are repugnant to the said Eighth Section of Article One of the Constitution of the United States and to the Tenth Section of Article One of the Constitution of the United States and to the Fifth Amendment of the Constitution of the United States and to the Fourteenth Amendment of the Constitution of the United States.

182 And your petitioner further says that in the said opinion filed by the said Springfield Court of Appeals, upon which said order and judgment of reversal were predicated, it was held that Sections 3037 to 3040 and 3342 of the Revised Statutes of Missouri, 1909, when applied in a case like this, were not repugnant to the Commerce Clause of the Constitution of the United States and were not repugnant to the Fourteenth Amendment to the Constitution of the United States and did not deny the right, privilege and immunity claimed by said Mergenthaler Linotype Company; that under the evidence said Mergenthaler Linotype Company, when it made its contract with defendant on the 12th of May, 1910, was transacting business in Missouri; that the business it transacted was not interstate but intrastate; that interstate commerce does not connote traffic-ing transactions wherein, under the terms of a lease signed in this State by lessee, and in another State by the lessor, the lessor moves into this State and leases to lessee for a term of years property which by the terms of the lease is to be removed to the State of shipment by the lessee at the end of the rental period.

And your petitioner therefore says that the question of the validity of the aforesaid Missouri Statutes, as applied to a case like this, was drawn in question in said case on the ground that said Sections of the Statutes were repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States as attempting to take said property of said Mergenthaler Linotype Company without due process of law and denying it the equal protection of the law and depriving it of its right, privilege and immunity under said constitution and amendments thereto, and in that they were violative of the Commerce clause of the Constitution of the United States aforesaid, and was by said Court decided in favor of the

183 validity of said Sections and against the contention of petitioner herein.

Your petitioner further states that in the trial and proceedings had in the Springfield Court of Appeals of the State of Missouri, and in the rendition and entry of a final decree and judgment in said Springfield Court of Appeals, reversing the decision of the Circuit Court of Butler County, and in the opinion of the said Court upon which said judgment and order of reversal was predicated, certain

errors were committed to the prejudice of your petitioner, violative of its rights, under the Constitution of the United States, all of which will more in detail appear in the Assignment of Errors which is filed with this petition.

And your petitioner further says that said decision of said Springfield Court of Appeals was against the right, privilege and immunity under the Fourteenth Amendment to the Constitution of the United States, which was specially set up and claimed by said Mergenthaler Linotype Company in its pleadings in said case and on the briefs filed by it in the said Springfield Court of Appeals, in this, that it deprived and deprives said Mergenthaler Linotype Company of its right, privilege and immunity to engage in leasing its machines in the State of Missouri by shipping same from the State of New York in interstate commerce, and was and is therefore repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States, as attempting to take the property of said Mergenthaler Linotype Company without due process of law, denying it the equal protection of the law, and denying it its said right, privilege and immunity.

Your petitioner further says that the said order and judgment of reversal rendered by said Springfield Court of Appeals is a final order and judgment, and that said Springfield Court of
184 Appeals is the highest court of the State of Missouri in which a decision in this suit and matter could be had.

Wherefore, your petitioner petitions and prays that a writ of error from the Supreme Court of the United States issue *in them* and its behalf to the Springfield Court of Appeals of the State of Missouri for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, be ordered transmitted to the Supreme Court of the United States.

Dated this 1st day of June, 1918.

(Signed) ABBOTT & EDWARDS,
DAVID W. HILL,
Attorneys for Petitioner, Mergenthaler Linotype Company.

STATE OF MISSOURI,
City of St. Louis, ss:

John B. Edwards, being duly sworn on his oath, says that he is agent and attorney for the Mergenthaler Linotype Company; that he has read the foregoing petition and says that the matters and things therein stated are true.

(Signed) JOHN B. EDWARDS.

Subscribed and sworn to before me this 1st day of June 1918. My commission expires on the 7 day of September 1920.

(Signed) C. C. WOLF,
Notary Public in and for the City of St. Louis, State of Missouri.

185 In the Springfield Court of Appeals.

MERGENTHALER LINOTYPE COMPANY, Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

Assignment of Errors.

In cause No. 1509, in said Court, wherein Plaintiff in Error, the Mergenthaler Linotype Company was Respondent, and Defendants in Error, Samuel W. Davis and W. B. Hays were Appellant- and in rendering and entering of record in said cause an order and judgment reversing the judgment of the Circuit Court of Butler County, Missouri, there is manifest error in this, to-wit:

First.

This Court in reversing the judgment in this cause erred for the reason that the acts done by the plaintiff in Error, as shown by the record in this cause, were acts done in Interstate Commerce, and therefore not within the purview of Sections 3037 to 3040 inclusive, and Section 3342 of the Revised Statutes of Missouri, 1909.

Second.

This Court in reversing the judgment in this cause erred for the reason that the acts done by the Mergenthaler Linotype Company as shown by the record in this cause were acts done in Interstate Commerce and not subject to State regulation in view of that clause of the Eighth Section of Article One of the Constitution of the United States, which provides as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several states —.

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Third.

This Court in reversing the judgment in this cause erred for the reason that its determination that a transaction of lease under the facts shown by the record in this cause is not a transaction in Interstate Commerce abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes."

Fourth.

This Court in reversing the judgment in this cause erred for the reason that its determination that Sections 3037 to 3040 inclusive

and Section 3342 of the Revised Statutes of Missouri, 1909, prevented the Mergenthaler Linotype Company, under the facts shown by the record in this cause, from leasing property in the State of New York to be used in the State of Missouri, amounted to a State regulation of Interstate Commerce repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have the power to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

Fifth.

This Court in reversing the judgment in this cause erred for the reason that its determination, under the facts shown by the record in this cause, that unless there were a passing of title to the article dealt in, a transaction could not amount to interstate commerce, abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian Tribes."

Sixth.

187 This court in reversing the judgment in this cause erred for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909, and also the opinion and judgment of this Court in the application and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian Tribes."

Seventh.

This Court in reversing the judgment in this cause erred, for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri 1909, and also the opinion and judgment of this Court in the application and construction of said statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Fifth Amendment to the Constitution of the United States which provides as follows: "No person shall be deprived of life, liberty or property without due process of law."

Eighth.

This Court in reversing the judgment in this cause erred, for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri 1909 and also the opinion and judgment

of this Court in the applicatio*b* and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the First Section of the Fourteenth Amendment to the Constitution of the United States which provides as follows: "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ninth.

This Court in reversing the judgment in this cause erred, for the reason that Section 3037 to 3040 inclusive and Section 3342 of
188 the Revised Statutes of Missouri, 1909 and also the opinion and judgment of this Court in the application and construction of said Statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Tenth Section of Article One of the Constitution of the United States which provides as follows: "No State shall pass any Law impairing the Obligation of Contracts."

Tenth.

This Court in reversing judgment herein rendered by the Butler Circuit Court deprives Plaintiff In Error, of its right, privilege and immunity to engage in Interstate Commerce under the law, all in violation and Contravention of the Fourteenth Amendment of the Constitution of the United States.

MERGENTHALER LINOTYPE COMPANY,
(Signed) ABBOTT & EDWARD,
By DAVID W. HILL,
Its Attorneys.

189 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Springfield Court of Appeals of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Springfield Court of Appeals of the State of Missouri, before you, or some of you, being the highest Court of law or equity of the said State in which a decision can be had in the said suit between Mergenthaler Linotype Company, a corporation, plaintiff, and Samuel W. Davis and W. B. Hays, Defendants, numbered 1509, wherein was drawn in question the validity of a statute or treaty of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an

authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the Mergenthaler Linotype Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly, and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this
190 writ, so that you have the same at Washington, D. C., on the — day of ——, next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this — day of ——, A. D. 1918.

Issued at office in the City of Springfield, with the seal of the District Court of the United States for the Southern Division of the Western District of Missouri, dated as aforesaid.

[SEAL.] (Signed) JOHN B. WARNER,
Clerk United States District Court for the Southern Division, Western District, Missouri,
(Signed) By GEORGE PEPPERDINE, *Deputy.*

Allowed by:
JNO. T. STURGIS,
Presiding Justice Supreme Court of Appeals of the State of Missouri.

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Springfield Court of Appeals, at Springfield, Missouri, this — day of June, A. D. 1918.

[SEAL.] BEN M. NEALE,
Clerk Springfield Court of Appeals of the State of Missouri.

191

Bond.

In the Supreme Court of the United States.

MERGENTHALER LINOTYPE COMPANY (a Corporation), Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

Know All Men By These Presents: That we, Mergenthaler Linotype Company, (a corporation organized under the laws of the State of New York), and United States Fidelity & Guaranty Company, (a corporation organized under the laws of the State of Maryland and authorized to do business in the State of Missouri), are held and firmly bound unto the above named Samuel W. Davis and W. B. Hays, in the sum of Five hundred Dollars, ($500.00), to be paid to the said Samuel W. Davis and W. B. Hays, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our, and each of our successors and assigns, jointly and severally, firmly by these presents.

Whereas, the Mergenthaler Linotype Company has sued out and prosecuted a writ of error from the Supreme Court of the United States to the Springfield Court of Appeals of the State of Missouri, to reverse a judgment and decree rendered by said Springfield Court of Appeals of the State of Missouri in a case wherein the Mergenthaler Linotype Company was plaintiff and respondent and said Samuel W. Davis was defendant and said W. B. Hays was defendant and appellant, number 1509 in said Court,

Now therefore, the condition of this obligation is such that if the above named Mergenthaler Linotype Company shall prosecute said writ of error to effect and answer all damages and costs
192 if it fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

(Signed) MERGENTHALER LINOTYPE COMPANY,
By ABBOTT & EDWARDS AND DAVID W. HILL,
Their Attorneys.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. R. NEEHAN, *Atty. in Fact.*

Approved June 3rd 1918.
JNO. T. STURGIS,
Presiding Justice Springfield Court of Appeals of the State of Missouri.

193 *Citation.*

In the Springfield Court of Appeals of the State of Missouri, March Term, 1918.

No. 1509.

THE MERGENTHALER LINOTYPE COMPANY (a Corporation), Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To Samuel W. Davis and W. B. Hays, in the State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Springfield Court of Appeals of the State of Missouri, in Cause No. 1509, in the last mentioned Court, wherein the Mergenthaler Linotype Company is plaintiff in error and Samuel W. Davis and W. B. Hays, are defendants in error, to show cause if any there be, why the judgment rendered against the respondents as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John T. Sturgis *Farrington*, Presiding Justice of the Springfield Court of Appeals of the State of Missouri, this — day of June, in the year of our Lord, One thousand nine hundred and eighteen.

(Signed) JNO. T. STURGIS,
Presiding Justice of the Springfield Court of Appeals of the State of Missouri.

Receipt of copy of the within notice received by us this 5th day of June, 1918.

SHEPPARD & SHEPPARD,
LESLIE C. GREEN, AND
EARNEST A. GREEN,
Attorneys for W. B. Hays.

194 I hereby certify that I served the within citation by delivery to the within named defendant; Samuel W. Davis; Furnished me by *the* Abbott & Edwards Atty., on the 11th day of June, 1918.

Done in Bates County, Butler, Missouri.
Fees, $1.00.

J. W. BAKER,
Sheriff of Bates County, Missouri.
O. A. BAKER, *Deputy.*

195 In the United States Supreme Court, October Term, 1918.

No. —.

THE MERGENTHALER LINOTYPE COMPANY (a Corporation), Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

For good cause shown, I, the undersigned John T. Sturgis, Presiding Justice of the Springfield Court of Appeals of the State of Missouri, the Justice who signed the citation in the above entitled cause, do hereby enlarge the time for docketing the above case and filing the record thereof with the Clerk of the United States Supreme Court, up to and including the 1st day of September, 1918.

Witness the Honorable John T. Sturgis, Presiding Justice of the Springfield Court of Appeals of the State of Missouri, this 14 day of June, in the year of Our Lord, One thousand nine hundred and eighteen.

JNO. T. STURGIS,
Presiding Justice of the Springfield Court of Appeals of the State of Missouri.

196 In the United States Supreme Court, October Term, 1918.

No. —.

THE MERGENTHALER LINOTYPE COMPANY (a Corporation), Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

For good cause shown, I, the undersigned John T. Sturgis, Presiding Judge of the Springfield Court of Appeals of the State of Missouri, the Justice who signed the citation in the above entitled cause, do hereby enlarge the time for docketing the above cause and

filing the record thereof with the Clerk of the United States Supreme Court, up to and including the first day of October, 1918.

Witness the Honorable John T. Sturgis, Presiding Justice of the Springfield Court of Appeals of the State of Missouri, this 12 day of August, in the year of Our Lord, One Thousand nine hundred and eighteen.

JOHN T. STURGIS,
Presiding Justice of the Springfield Court of Appeals of the State of Missouri.

197 In the Supreme Court of the United States.

MERGENTHALER LINOTYPE CO. (a Corporation), Plaintiff in Error,

vs.

SAMUEL W. DAVIS and W. B. HAYS, Defendants in Error.

Stipulation Concerning Transcript.

It is hereby stipulated and agreed by and between the Mergenthaler Linotype Co., Plaintiff in Error in the above entitled cause, (which said cause was numbered 1509 in the Springfield Court of Appeals of the State of Missouri) and W. B. Hays, Defendant in Error therein, by and through their respective counsel, that the following portions of the record in the Springfield Court of Appeals shall constitute the transcript of record on the Writ of Error in the above entitled cause:

First. The certified copy of the judgment of the Circuit Court of Butler County, Missouri and the order granting appeal, also the printed abstract of the record filed by W. B. Hays as Appellant in said Cause number 1509 in said Springfield Court of Appeals, together with original opinion of the Court of Appeals.

Second. The mandate on certiorari proceedings from the Supreme Court of Missouri in case of ex rel. Hays vs. Robertson, et al. and the opinion of the Supreme Court accompanying same.

Third. The final order and judgment of said Springfield Court of Appeals reversing the judgment of the Circuit Court of Butler County, Missouri, in said cause.

Fourth. The opinion delivered in said Springfield Court of Appeals on which said judgment of reversal was predicated.

198 Fifth. The motion for rehearing filed in said Springfield Court of Appeals, by the Mergenthaler Linotype Company, as Respondent in said cause.

Sixth. The Order of said Springfield Court of Appeals overruling said motion for rehearing filed by Mergenthaler Linotype Co., as Respondent in said cause.

Seventh. The petition of the Mergenthaler Linotype Company, Plaintiff in Error, for a Write of Error from the Supreme Court of

the United States to the Springfield Court of Appeals of the State of Missouri in said cause.

Eighth. The order made by Honorable John T. Sturgis, Presiding Judge of said Springfield Court of Appeals, allowing a Writ of Error in said cause from the Supreme Court of the United States to the Springfield Court of Appeals of the State of Missouri, and fixing the amount of the bond.

Ninth. The Assignment of Errors filed in said cause by the Mergenthaler Linotype Co., Plaintiff in Error.

Tenth. The Writ of Error issued in said cause from the Supreme Court of the United States to said Springfield Court of Appeals of the State of Missouri, together with the return of the clerk of the Springfield Court of Appeals thereon.

Eleventh. The bond filed in said cause by the Mergenthaler Linotype Co., Plaintiff in Error, together with the certificate of approval thereof.

Twelfth. The citation issued in said cause, together with proof of service thereon.

Thirteenth. The order enlarging the time for filing transcript.

Fourteenth. This stipulation.

ABBOTT & EDWARDS,
DAVID W. HILL,
Attorneys and of Counsel for the Mergenthaler Linotype Company, Plaintiff in Error.
SHEPPARD & SHEPPARD,
LESLIE C. GREEN, AND
ERNEST A. GREEN,
Attorneys and of Counsel for W. B. Hays, Defendant in Error.

199 In the Springfield Court of Appeals.

Number 1509.

MERGENTHALER LINOTYPE COMPANY, Respondent,

vs.

W. B. HAYS & SAMUEL W. DAVIS, Appellants.

STATE OF MISSOURI, *ss:*

I, Ben M. Neale, Clerk of the Springfield Court of Appeals do certify that the foregoing is a full, true and complete transcript of all records and proceedings, in the above entitled cause, as called for by the præcipe filed herein, and made a part hereof, as fully as the same appear of record or on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Springfield Court of Appeals, at my office in the City of Springfield, State aforesaid, this 12 day of August, A. D. 1918.

[Seal Springfield Court of Appeals, Missouri.]

BEN M. NEALE,
Clerk of the Springfield Court of Appeals.

Endorsed on cover: File No. 26,706. Missouri, Springfield, Court of Appeals. Term No. 620. Mergenthaler Linotype Company, plaintiff in error, vs. Samuel W. Davis and W. B. Hays. Filed August 19th, 1918. File No. 26,706.

No. 192

United States Supreme Court

MERGENTHALER LINOTYPE CO.
Plaintiff-in-Error

against

H. B. DAVIS and W. H. HAYS
Defendants-in-Error

Statement and Brief on Behalf of Plaintiff-in-Error

BRADFORD BUTLER
Attorney for Plaintiff-in-Error
Mergenthaler Linotype Company

ARTHUR PETERSON COMPANY, New York.

INDEX.

CASES CITED.

United States Supreme Court.

MERGENTHALER LINOTYPE CO.,
Plaintiff-in-Error,
against
H. B. DAVIS and W. H. HAYS,
Defendants-in-Error.

STATEMENT AND BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement of Facts.

This is a writ of error to a judgment of the Springfield Court of Appeals of the State of Missouri, reversing a judgment of the Circuit Court of Butler County, Missouri, in favor of plaintiff-in-error (plaintiff below) (Rec., p. 77).

Plaintiff-in-error is a New York corporation (Rec., pp. 3, 78) and during the time of the transactions involved in the instant case, had not complied with the statutes of Missouri regarding the transaction of business in that State by foreign corporations (Rec., p. 9). During the period in question, it had no office for the transaction of business, no bank account nor resident agent in the State of Missouri, and none of its products were made or stored in that State (Rec., pp. 9, 22, 23, 31, 35, 73, 74).

In considering the facts as disclosed by the record, they will be treated from two standpoints,

first, in their relation to the transactions between the parties to this action, and, *secondly*, as bearing upon the alleged transaction of business by plaintiff in Missouri in general.

FACTS OF TRANSACTIONS BETWEEN PLAINTIFF AND DEFENDANTS.

Plaintiff-in-error had in its employ a travelling salesman or solicitor attached to its Chicago office (Rec., p. 27), a part of whose duties was to travel in Missouri and solicit orders, and who obtained an order from the defendants-in-error in this action (Rec., pp. 9, 14, 27, 35, 65, 71).

This order was written out on a blank in Missouri (Rec., pp. 14, 65, 71), and was mailed to plaintiff's Chicago office by the salesman (Rec., pp. 14, 19, 65, 71) where investigation was made respecting the proposed customer (Rec., pp. 19, 32) and then forwarded with such advices, to plaintiff's main office in New York City for approval or disapproval (Rec., pp. 15, 19, 23, 33, 65, 71), all orders being completely subject to the approval of the officers of the plaintiff in the State of New York (Rec., pp. 15, 16, 19, 28, 65, 71). Thereupon the order was accepted in New York by the proper officers of plaintiff (Rec., pp. 9, 19, 23, 65, 71) who later prepared and forwarded to defendants in Missouri a lease form, which was executed by defendants in Missouri (Rec., pp. 9, 19, 23) and remailed to plaintiff in New York who, after its receipt, also executed it and returned a copy to defendants (Rec., pp. 9, 19, 23, 24, 27). This lease is set forth in full in the record (Rec., pp. 10-14 and 79-83). It contains sixteen clauses but only the paragraphs numbered "First,"

"Third," "Fifth," "Seventh," "Ninth," "Tenth" and "Eleventh," so far as the record discloses, ever became of any importance in this case. These paragraphs provide that the lessor shall deliver the specified linotype machine to the lessees f. o. b. City of New York (Pars. 1st and 3rd, Rec., pp. 10-11), where the lessees shall accept it and transport it to their place of business at Poplar Bluff, Missouri, paying the necessary freight (Par. 5th, Rec., p. 11); that lessees shall pay an annual rental of $632.50 in New York Exchange (Pars. 5th and 11th, Rec., p. 12). The lessees agree to keep the machine in good repair and permit lessor's inspector to view it at reasonable times (Par. 7th, Rec., p. 11). The lease is for a term of six years (Par. 10th, Rec., p. 12) during which period the lessees shall keep it insured for the benefit of the lessor, it being stipulated that the lessor may insure and charge lessees with the premiums (Par. 9th, Rec., p. 12). At the end of the term the machine was to be returned to plaintiff (Par. 10th, Rec., p. 12).

Defendants duly made the first payment in New York City and the machine was delivered f. o. b. Brooklyn, New York (Rec., p. 9). The manner in which the insurance was effected was that plaintiff gave the order therefor to their brokers in New York, who effected the insurance, and upon the failure of the customer to pay, plaintiff paid it to the New York office of their brokers (Rec., p. 22). It does not affirmatively appear that any order for supplies was ever given by defendants to plaintiff and it inferently appears that none was ever given (Rec., p. 16). It further appears affirmatively that in this case plaintiff did not either furnish a man to install the machine (Rec.,

pp. 28, 33, 34) nor an operator (Rec., pp. 21, 28, 33). Local taxes were paid by defendants (Rec., p. 22). It inferentially appears that one of plaintiff's men inspected the machine in Missouri about three or four times (Rec. p. 25). After the initial payment no further sum was paid by defendants, and plaintiff finally brought suit for the rental payments and insurance premiums falling due in the years 1911 to 1914 inclusive (Rec., pp. 4, 10), which sums with interest from their respective due dates, amounted to $2,814.92 (Rec., pp. 4, 6, 10). Defendants interposed an amended answer which set forth that plaintiff, a foreign corporation, was transacting business in the State of Missouri without having complied with Sections 3039-3040, Revised Statutes of Missouri, 1909, and that consequently the contract and lease in question were "illegal and void and any action" thereon was "barred" by virtue of the said statutory provisions (Rec., pp. 5, 6). Plaintiff entered a general denial to the allegations of the answer (Rec., p. 6), and after due hearing, the Circuit Court of Butler County entered judgment for plaintiff (plaintiff-in-error) (Rec., p. 6). Defendants thereupon appealed to the Springfield Court of Appeals (Rec., pp. 60, 63) which Court duly affirmed the judgment (Rec., pp. 64-69). A writ of certiorari was thereupon sued out, bringing the case before the Missouri Supreme Court which quashed the judgment of the Springfield Court of Appeals on the ground that the judgment of the latter was not in conformity with the opinion of the Missouri Supreme Court in an earlier case (Rec., pp. 70-76). Upon remittitur to the Springfield Court of Appeals, that Court reversed the judgment of the

Butler County Circuit Court in favor of plaintiff (plaintiff-in-error) (Rec., pp. 77-85). Plaintiff-in-error moved for a rehearing (Rec., pp. 85-88) and upon its denial (Rec., p. 88) petitioned for a writ of error from the United States Supreme Court (Rec., pp. 89-97), upon which this writ of error (Rec., pp. 97-98) and citation (Rec., p. 100) duly issued.

FACTS OF OTHER TRANSACTIONS OF PLAINTIFF WITH RESIDENTS OF MISSOURI.

Plaintiff first began to do business with residents of Missouri in December, 1895 (Rec., p. 20) and the details of other lease transactions into which it entered were substantially the same as those which took place in the instant case (Rec., pp. 17, 18, 20, 35, 65, 71). All told, plaintiff leased about 300 machines to residents of Missouri, up to the time of the lease in the instant case (Rec., pp. 20, 28, 30), eleven of which were during that portion of 1910 prior to the present transaction (Rec., pp. 17, 18, 65, 71). Forty-five such contracts were in force when the present leases were signed (Rec., pp. 23, 65, 72). During the same period, in addition to the leases of machines, plaintiff sold to residents of Missouri, 110 machines, of which 100 were sold partly for cash and partly on mortgage (Rec., p. 25), but in all cases the negotiations were conducted in the same manner as outlined in the instant case (Rec., p. 25). In some of these other cases supplies were purchased by the customers, the practice being that orders for the same were sent from Missouri either to plaintiff's New York or Chicago office (Rec., pp. 9, 29), and payments were made to the one or the other (Rec., pp. 9, 29, 31) as the case might be. Some

of these machines were erected by machinists furnished by plaintiff, which machinists usually were paid by the customer direct (Rec., p. 21), but it does not appear that plaintiff ever furnished an operator (Rec., p. 21). In almost all lease cases, the customer exercised the option to purchase which was contained in the lease (Rec., p. 24), but in certain cases they did not, and in all of such cases the machines in question were returned to New York (Rec., p. 24).

OPINIONS OF THE COURTS.

The opinion of the Springfield Court of Appeals on the appeal to it by defendant (Rec., pp. 64-69), affirmed the judgment in favor of plaintiff (plaintiff-in-error) on the ground that the facts of the case showed that the transaction between plaintiff and defendants "was a transaction embraced within the bounds of interstate commerce and not intrastate commerce and was therefore not to be fettered by the Missouri statutes" (Rec., p. 64) and that "the evidence * * * fails * * * to show that the acts of the plaintiff in making this lease and in performing the terms thereof * * * digressed from carrying on business classified as interstate commerce, and wholly fails to evidence any fact showing that plaintiff had undertaken to carry on any local business, or intrastate commerce, in the State of Missouri" (Rec., p. 66). Further, "the whole scope and purpose of this contract was to lease the property of a citizen of one State to a citizen of another State at a stipulated rental; it was an intercourse between citizens of different states which falls within the purview of the commerce clause of the Constitution" (Rec., p. 66).

It is therefore clear that the majority opinion of this Court was based flatly on two positions, *first*, that the acts of the plaintiff-in-error were purely interstate commerce transactions, which involved the ruling, *secondly*, that a lease between citizens of different states was "commerce" within the judicial construction of the interstate commerce clause of the Constitution.

In addition to the majority opinion of the Springfield Court of Appeals on this appeal, a concurring opinion was filed by Judge Sturgis. This opinion while reaching the same result as that of the majority, avoided passing upon the propriety of actions by plaintiff-in-error not directly involved in the facts of the instant case. It adopted the secondary position of the majority that a *lease* between citizens of different states constituted interstate commerce, and further held that "the fact that a foreign corporation, a citizen of another state, may be doing business in this state in violation of our laws and thereby making itself subject to penalties and a denial of the right to enforce demands growing out of such intrastate business, does not and cannot be made to deny or curtail its right to engage in interstate commerce and to enforce demands arising therefrom. Contracts pertaining to interstate commerce are lawful regardless of the unlawfulness of contracts made by the same foreign corporation arising from intrastate business and the penalty imposed for doing intrastate business in violation of state laws cannot be used or applied to hamper or impair interstate commerce because the latter is not subject to state control or regulation" (Rec., pp. 67-68). This concurring opin-

ion concludes: "since the contract sued on, or at least that part of it sought to be enforced here, pertains to interstate commerce and is therefore lawful * * * it is immaterial whether plaintiff may have been at the time or since engaged in doing business in this state in violation of our state laws" (Rec., p. 69).

The opinions of the Springfield Court of Appeals therefore develop four distinct theses upon which to base judgment for plaintiff-in-error, namely:

1. All of the acts of plaintiff-in-error in its entire transactions with residents of Missouri were transactions in interstate commerce.

2. The transactions of plaintiff-in-error in the present transaction were acts done purely in interstate commerce and therefore any other acts done by it at other times were immaterial.

3. Irrespective of the question of whether plaintiff-in-error in this or other transactions had done intrastate business, the only claims, the enforcement of which were here sought, were claims growing out of a pure interstate transaction not involving any feature of intrastate business.

4. As an inevitable consequence of each of the foregoing positions, and also as an independent question,—a lease of property by a citizen of one state to a citizen of another was "commerce" within the Commerce Clause of the Constitution and entitled to immunity as such in equal degree with an out and out sale.

The opinion of the Missouri Supreme Court (Rec., pp. 70-76) adopted the exact opposite po-

sition on each of these four points. The gist of the position adopted by this opinion may be gathered from the following excerpts: "We are of opinion that any foreign corporation, without taking out a license in Missouri under Sections 3037, 3039, 3040 and 3342, R. S., 1909, can, under the commerce clause of the Federal Constitution, unhindered wholly by us or the laws of this State, sell its type-casting machines or other commodities to citizens of this State under such terms as it sees fit * * *" (Rec., p. 75). Again: "Interstate commerce, as to the particular phase confronting us, connotes trafficking transactions between citizens of different states, whereby the title of the seller in the commodity sold is transferred to the buyer, or agreed so to be upon contingency of payment of the purchase price by instalments or otherwise" (Rec., p. 75). Finally: "In interstate commerce the delivery of the commodity to the purchasing citizen of another state may be either in the domicil of the vendor or of that of the vendee; it may be for cash, or on time, by giving credit and taking back security; by payment in full or by instalments, but if the title to the commodity does not pass, and is not to pass, certainly the business is not traffic; it is not buying and selling" (Rec., p. 76).

After the quashal of its former judgment, the Springfield Court of Appeals, on remittitur, while bowing to the power of the Missouri Supreme Court, indicated in its opinion rendering final judgment against plaintiff-in-error, that on the legal merits of the questions at issue, it retained its former opinion (Rec., p. 85).

ERRORS RELIED UPON.

The errors below to which plaintiff-in-error respectfully invites the attention of this Court, and urges at this time are the following:

"FIRST.—This Court in reversing the judgment in this cause erred for the reason that the acts done by the plaintiff-in-error, as shown by the record in this cause, were acts done in interstate commerce, and therefore not within the purview of Sections 3037 to 3040 inclusive, and Section 3342 of the Revised Statutes of Missouri, 1909.

"SECOND.—This Court in reversing the judgment in this cause erred for the reason that the acts done by the Mergenthaler Linotype Company as shown by the record in this cause were acts done in Interstate Commerce and not subject to State regulation in view of that clause of the Eighth Section of Article One of the Constitution of the United States, which provides as follows: 'The Congress shall have power to regulate commerce with foreign nations and among the several states * * *.'

"THIRD.—This Court in reversing the judgment in this cause erred for the reason that its determination that a transaction of lease under the facts shown by the record in this cause is not a transaction in Interstate Commerce abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: 'The Congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian Tribes.'

"FOURTH.—This Court in reversing the judgment in this cause erred for the reason

that its determinatin that Section 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909, prevented the Mergenthaler Linotype Company, under the facts shown by the record in this cause, from leasing property in the State of New York, to be used in the State of Missouri, amounted to a State regulation of Interstate Commerce repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: 'The Congress shall have the power to regulate Commerce with foreign nations and among the several states and with the Indian Tribes.'

"FIFTH.—This Court in reversing the judgment in this cause erred for the reason that its determination, under the facts shown by the record in this cause, that unless there were a passing of title to the article dealt in, a transaction could not amount to interstate commerce, abridges the rights of Mergenthaler Linotype Company under that clause of the Eighth Section of Article One of the Constitution of the United States which provides as follows: 'The Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian Tribes.'

"SIXTH.—This Court in reversing the judgment in this cause erred for the reason that Sections 3037 to 3040 inclusive and Section 3342 of the Revised Statutes of Missouri, 1909, and also the opinion and judgment of this Court in the application and construction of said statutory enactments to the proofs submitted in this cause are void, the same being repugnant to that clause of the Eighth Section of Article One of the Constitution of the United States which provies as follows: 'The Congress shall have power to regulate commerce with foreign nations and among

the several States and with the Indian Tribes.'"

The foregoing assignments are among those contained in the assignment of errors on pages 95 and 96 of the record, and it is submitted that their language is without question sufficiently broad to permit this Court to decide the merits of the interstate commerce questions involved in the case.

POINTS AND AUTHORITIES.

POINT I.

It is fundamental that any enactment by a State which places a burden on interstate commerce is void, the only exception being in the extremely limited and closely guarded class of cases which properly fall under the police power.

MINNESOTA RATE CASES, 230 U. S., 352, 396, 397 (57 L. Ed., 1511);

COUNTY OF MOBILE v. KIMBALL, 102 U. S., 691, 702 (26 L. Ed., 238);

RE DEBBS, 158 U. S., 564, 581 (39 L. Ed., 1092);

ROSSI v. COMMONWEALTH OF PENNSYLVANIA, 238 U. S., 62, 66 (59 L. Ed., 1201);

ROBBINS v. TAXING DISTRICT OF SHELBY, 120 U. S., 489 (30 L. Ed., 694);

WEST v. KANSAS NATURAL GAS CO., 221 U. S., 229 (55 L. Ed., 716);

BUTLER BROS. SHOE CO. v. U. S. RUBBER COMPANY, 156 Fed., 1;

LYNG v. STATE OF MICHIGAN, 135 U. S., 161 (34 L. Ed., 150);

BALTIC MINING COMPANY v. MASSACHUSETTS, 231 U. S., 68, 82 (58 L. Ed., 127);

POSTAL TELEGRAPH CO. v. ADAMS, 155 U. S., 688, 695, 696, 700 (39 L. Ed., 311);

CRUTCHER v. KENTUCKY, 141 U. S., 47 (35 L. Ed., 649);

SIOUX REMEDY COMPANY v. COPE, 235 U. S., 197, 201, 205 (59 L. Ed., 193);

HASKELL v. COWHAN, 187 Fed., 403, 407, 408, 409;

LOONEY v. CRANE COMPANY, 245 U. S., 178, 187, 188 (62 L. Ed., 230);

BROWN v. MARYLAND, 12 Wheat., 419, 446, 447, 448;

INTERNATIONAL PAPER CO. v. MASSACHUSETTS, 246 U. S., 135, 141, 142 (62 L. Ed., 624);

CHENEY BROTHERS CO. v. MASSACHUSETTS, 246 U. S., 147, 153, 154 (62 L. Ed., 632);

LEISY & COMPANY v. HARDIN, 135 U. S., 100 (34 L. Ed., 128);

CALDWELL v. NORTH CAROLINA, 187 U. S., 622, 625 (47 L. Ed., 336);

GLOUCESTER FERRY CO. v. PENNSYLVANIA, 114 U. S., 196 (29 L. Ed., 158);

12 Corpus Juris 14;

SAVAGE v. JONES, 225 U. S., 501, 524 (56 L. Ed., 1182);

BRENNAN v. TITUSVILLE, 153 U. S., 289, 299 (38 L. Ed., 719).

POINT II.

It is well settled that a State requirement similar to that in Sections 3039-3040 Revised Statutes of Missouri, 1909, to the effect that a foreign corporation procure a local license under penalty of being denied access to the courts to enforce obligations arising from transactions in interstate commerce, imposes an unconstitutional burden on such commerce.

INTERNATIONAL TEXTBOOK CO. v. PIGG, 217 U. S., 91, 105-108, 110-113 (54 L. Ed., 678);

SIOUX REMEDY CO. v. COPE, 235 U. S., 197, 202, 203 (54 L. Ed., 193);

INTERNATIONAL HARVESTER CO. v. OLIVER, 192 Fed., 59, 64, 65;

BUTLER BROS. SHOE CO. v. U. S. RUBBER COMPANY, 156 Fed., 1;

WESTERN UNION TELEGRAPH CO. v. KANSAS, 216 U. S., 1, 26 (54 L. Ed., 355);

COOPER MANUFACTURING CO. v. FERGUSON, 113 U. S., 727 (28 L. Ed., 1137);

AMERICAN MERCANTILE CO. v. CIRCULAR ADVERTISING CO., 71 So. Rep., 607;

NORFOLK & WESTERN R. R. Co. v. PENNSYLVANIA, 136 U. S., 114, 118 (34 L. Ed., 394);

12 Corpus Juris, p. 117;

PEOPLE OF THE STATE OF NEW YORK v. ROBERTS, 171 U. S., 658, 661 (43 L. Ed., 323);

NORFOLK & WESTERN R. R. Co. v. SIMS, 191 U. S., 441, 446 (48 L. Ed., 254);

PARSONS-WILLIS LUMBER CO. v. STUART, 182 Fed., 779;

SINGER SEWING MACHINE CO. v. BRICHELL, 233 U. S., 304 (58 L. Ed., 974).

POINT III.

The protection of the freedom of conduct of interstate commerce is a practical matter, and the United States Supreme Court will examine the evidence of the transaction as a whole to determine whether the transaction actually constitutes interstate commerce since the decision depends on what actually transpired in the case.

HEYMAN v. HAYS, 236 U. S., 178, 186 (59 L. Ed., 527);

INTERSTATE AMUSEMENT CO. v. ALBERT, 239 U. S., 560, 566 (60 L. Ed., 439);

BUTLER BROS. SHOE CO. v. U. S. RUBBER CO., 156 Fed., 1;

WESTERN UNION TELEGRAPH CO. v. KANSAS, 216 U. S., 1, 27 (54 L. Ed., 355);

REGINA COMPANY v. TOYNBEE, 163 Wis., 551, 554;

SOUTH COVINGTON & CINCINNATI ST. RY. CO. v. CITY OF COVINGTON, 235 U. S., 537 (59 L. Ed., 350).

POINT IV.

It has repeatedly been held that where orders are accepted outside the State in question, having been transmitted either by mail or by canvassers, and such orders result in interstate carriage, that the transaction is one in interstate commerce, and that such characterization is not avoided by the fact that the contract from which the importation results requires some related act to be done by the foreign corporation after the importation.

REARICK v. PENNSYLVANIA, 203 U. S., 507, 512 (51 L. Ed., 295);

CRENSHAW v. ARKANSAS, 227 U. S., 389, 400 (57 L. Ed., 565);

ROGERS v. ARKANSAS, 227 U. S., 401 (57 L. Ed., 569);

BRENNAN v. TITUSVILLE, 153 U. S., 289, 297, 303 (38 L. Ed., 79);

STOUTENBURGH v. HENNICK, 129 U. S., 141, 147 (32 L. Ed., 637);

ASHER v. TEXAS, 128 U. S., 129, 132 (32 L. Ed., 368);

12 Corpus Juris, p. 106;

U. S. v. TUCKER, 188 Fed., 741, 743;

U. S. v. UNITED SHOE MACHINERY CO., 234 Fed., 127, 143-146;

BUTLER BROS. SHOE CO. v. U. S. RUBBER CO., 156 Fed., 1;

SAVAGE v. JONES, 225 U. S., 501, 519 (56 L. Ed., 1182);

WARE & LELAND v. MOBILE COUNTY, 209 U. S., 405, 409, 412 (52 L. Ed., 855);

American Express Company v. Iowa, 196 U. S., 133, 143 (49 L. Ed., 417);
Charge to Grand Jury, 151 Fed., 834, 838;
U. S. v. Chicago, M. & St. P. R. R. Co., 149 Fed., 486, 488;
Chicago, R. I. & P. R. R. Co. v. Wright, 239 U. S., 548, 550 (60 L. Ed., 548);
12 Corpus Juris, 25;
Davis v. Commonwealth of Virginia, 236 U. S., 697, 698 (59 L. Ed., 795);
Dozier v. Alabama, 218 U. S., 124, 127 (54 L. Ed., 965);
12 Corpus Juris, p. 19;
York Manufacturing Co. v. Colley, 247 U. S., 21, 24 (62 L. Ed., 963);
12 Corpus Juris, p. 28;
Louisville Trust Co. v. Bayer Steam Soot Blower Co., 166 Ky., 744, 749.

POINT V.

Authoritative decisions have determined that although a foreign corporation may have transacted business in a State in violation of local laws, such corporation cannot be denied access to the courts or otherwise penalized in connection with an interstate transaction, since the interstate contract is valid and the local State laws can be given no extraterritorial effect to invalidate it.

Sioux Remedy Co. v. Cope, 235 U. S., 197, 201, 202, 204 (59 L. Ed., 193);
Postal Telegraph Co. v. Adams, 155 U. S., 688, 698 (39 L. Ed., 311);

CRUTCHER v. KENTUCKY, 141 U. S., 47 (35 L. Ed., 649);
HORN SILVER MINING CO. v. NEW YORK, 143 U. S., 305, 315 (36 L. Ed., 164);
HASKELL v. COWHAN, 187 Fed., 403, 407, 409;
WESTERN UNION TELEGRAPH CO. v. KANSAS, 216 U. S., 1, 26, 33, 37 (54 L. Ed., 355);
LELOUP v. PORT OF MOBILE, 127 U. S., 640, 645 (32 L. Ed., 311);
ALLEN v. PULLMAN PALACE CAR CO., 191 U. S., 171, 180 (48 L. Ed., 134);
AMERICAN BROOM & BRUSH CO. v. ADDICKES, 19 Misc. (N. Y.), 36, 38; 42 N. Y. Supp., 871;
WEST v. KANSAS NATURAL GAS CO., 221 U. S., 229, 260 (55 L. Ed., 716);
LOVERIN & BROWN CO. v. TRAVIS, 135 Wis., 322 (115 N. W. Rep., 829);
STANDARD OIL CO. OF INDIANA v. MISSOURI, 218 Mo., 1 (116 S. W. Rep., 902); aff'd 224 U. S., 270 (56 L. Ed., 760);
LA MOINE LUMBER & TRADING CO. v. KESTERSON, 171 Fed., 980, 982;
19 Cyc., 1301;
12 Corpus Juris, 109, 110;
BUCK STOVE & RANGE CO. v. VICKERS, 226 U. S., 205 (57 L. Ed., 189);
INTERNATIONAL HARVESTER CO. v. OLIVER, 192 Fed., 59, 64;
AMERICAN EXPRESS CO. v. IOWA, 196 U. S., 133, 143 (49 L. Ed., 417);
RHODES v. STATE OF IOWA, 170 U. S., 412, 424 (42 L. Ed., 1088).

POINT VI.

A transaction of lease as shown in the facts of the instant case is within all the standard accepted definitions of interstate commerce.

PENNSYLVANIA R. R. Co. v. CLARK BROS. COAL MINING Co., 238 U. S., 456, 466, 467 (59 L. Ed., 1406);

SAVAGE v. JONES, 225 U. S., 501, 519 (56 L. Ed., 1182).

DAVIS v. VIRGINIA, 236 U. S., 697, 698 (59 L. Ed., 795);

SWIFT & COMPANY v. U. S., 196 U. S., 375, 398 (49 L. Ed., 518);

COUNTY OF MOBILE v. KIMBALL, 102 U. S., 691, 696, 702 (26 L. Ed., 238);

HOKE v. UNITED STATES, 227 U. S., 308, 320 (57 L. Ed., 523);

PENSACOLA TELEGRAPH Co. v. WESTERN UNION TELEGRAPH Co., 96 U. S., 1, 9 (24 L. Ed., 708);

RE DEBBS, 159 U. S., 564, 591 (39 L. Ed., 1092);

INTERNATIONAL TEXT BOOK Co. v. PIGG, 217 U. S., 91, 106 (54 L. Ed., 678);

HEYMAN v. HAYS, 236 U. S., 178, 186, 187 (59 L. Ed., 527);

CRENSHAW v. ARKANSAS, 227 U. S., 389 (57 L. Ed., 565);

REARICK v. PENNSYLVANIA, 203 U. S., 507, 512 (51 L. Ed., 295);

WELTON v. MISSOURI, 91 U. S., 275, 279 (23 L. Ed., 347);

GIBBONS v. OGDEN, 9 Wheat., 1, 189, 193, 229.

ADAIR v. UNITED STATES, 208 U. S., 161, 176 (52 L. Ed., 436);

PACIFIC EXPORT CO. v. SEIBERT, 44 Fed., 310, 316; aff'd 142 U. S., 339 (35 L. Ed., 1035);

CHARGE TO GRAND JURY, 151 Fed., 834, 838;

LA MOINE LUMBER & TRADING CO. v. KESTERSON, 171 Fed., 980, 982;

POMEROY CONSTITUTIONAL LAW, page 376;

SNEAD v. CENTRAL OF GA. R. R. Co., 151 Fed., 608, 612;

BUTLER SHOE COMPANY v. U. S. RUBBER COMPANY, 156 Fed., 1;

SECURITY STATE BANK v. SIMMONS, 251 Mo., 2, 12;

HOPKINS v. U. S., 171 U. S., 598 (43 L. Ed., 290);

BROOKS v. SOUTHERN PAC. CO., 148 Fed., 986, 991;

BROWN v. MARYLAND, 12 Wheat., 419, 446.

VERMONT FARM MACHINERY CO. v. HALL, 80 Oregon, 308, 319;

GROVES v. SLAUGHTER, 40 U. S. (15 Pet.), 449, 511 (10 L. Ed., 200);

U. S. v. TUCKER, 188 Fed., 741, 743;

KANSAS CITY v. MCDONALD, 175 S. W. Rep., 917, 919;

LOVERIN & B. CO. v. TRAVIS, 135 Wis., 323, 331;

PATRICK & CO. v. DESCHAMP, 145 Wis., 224, 227.

POINT VII.

It has been uniformly held that the passing of title was immaterial in the question of whether a particular transaction amounted to interstate commerce, and in all cases which have been found involving the point, it has been held that a lease could constitute commerce as well as a sale.

UNITED STATES v. UNITED SHOE MACHINERY Co., 234 Fed., 127, 143, *et seq.;*

UNITED STATES v. UNITED SHOE MACHINERY Co., 227 Fed., 507;

VULCAN STEAM SHOVEL Co. v. FLANDERS, 205 Fed., 102, 104;

BOGATA MERCANTILE Co. v. OUTCULT ADVERTISING Co., 184 S. W. Rep. (Tex.), 333, 334;

VERMONT FARM MACHINERY Co. v. HALL, 80 Oregon, 308, 320;

BUTLER BROS. SHOE Co. v. UNITED STATES RUBBER Co., 156 Fed., 1, 15, *et seq.;* cited with approval in

INTERNATIONAL TEXT BOOK Co. v. PIGG, 217 U. S., 91, 107 (54 L. Ed., 678).

REGINA COMPANY v. TOYNBEE, 163 Wis., 551.

BRIEF AND ARGUMENT.

It can serve no good purpose to dwell at length upon the fact that the Federal Constitution is the supreme law and that any state enactment which infringes upon it is necessarily void. Idle also would be a lengthy consideration of the vast army of cases which have decided that any burden placed by a state upon interstate commerce infringes Section Eighth of Article One of the Constitution, and is, therefore, invalid. The first question, therefore, to which the attention of the Court is invited is whether, granting for the moment, that the transactions in the instant case were interstate commerce, Sections 3039-3040 of the Revised Statutes of the State of Missouri of 1909, as construed by the Missouri courts and applied to the facts in this case, did constitute a burden upon such interstate commerce.

Section 3039, which is rather long, provides in substance that every foreign commercial corporation doing business in the state shall file with the secretary of state a copy of its charter and a sworn statement particularly specifying the business in which it proposes to engage in the state; also that the principal agent in the state shall file a verified statement of the proportion of its capital located in Missouri, and of the location of its principal office. Upon the filing of such papers, the corporation is required to pay certain incorporation taxes and fees, whereupon the secretary of state will issue a certificate of compliance which shall continue in force for a certain specified time, and may then be renewed upon like terms.

This is the section with which plaintiff, admittedly had not complied at the time of the making

of the contract of lease which is the subject of this action.

The following section, 3040, which provides the "penalty for violation of two preceding sections" enacts that every foreign commercial corporation doing business in the State which fails to comply with the provisions of this law shall be subject to a minimum fine of $1,000.00, and

> "In addition to which penalty, on and after the going into effect of said sections *no foreign corporation*, as above defined, which shall fail to comply with said sections, *can maintain any suit* or action, either legal or equitable in any of the courts of this state, *upon any demand*, whether arising out of contract or tort * * *." (Italics ours.)

A careful reading of the foregoing sections, with the facts of the instant case in mind, would seem to indicate that they were simply not applicable to the plaintig-in-error on the facts shown in the record but the final judgment in the State Court has held that they are, and this construction is therefore binding upon the further consideration of the case. As this Court said in the case of *Caldwell* v. *North Carolina* (187 U. S., 622, 47 L. Ed., 336), at page 624:

> "It might fairly be contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the Supreme Court of North Carolina has held otherwise, we must accept that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed,

> is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for we think the case falls within previous decisions of this Court on this subject."

Again in *People of the State of New York ex rel. Parke, Davis & Co. v. Roberts* (171 U. S., 658, 43 L. Ed., 323), this Court said at page 661:

> "The construction put upon the statute of the State of New York by its courts is, of course, binding upon this court * * *."

We are therefore forced to the conclusion that the plaintiff, under the statutes of Missouri above set forth is debarred, in consequence of its acts as shown in the record from maintaining "*any* suit" upon "*any* demand." In other words, it results from the Missouri Statute in question that if a foreign corporation ever in its history has done any acts which come within the definition of "doing business" adopted by the Missouri Courts, that then forevermore such corporation is an outlaw, and even its contracts in interstate commerce are unenforceable in the courts of that state. It is believed that one has but to state this position to demonstrate its untenability in view of Section Eight of Article One of the Federal Constitution. Fortunately, however, the probative force of pure logic need not stand alone in demonstrating that such is not the law. It has been repeatedly held that whatever the past history of a corporate plaintiff respecting the transaction of intrastate business, any state legislation requiring the obtaining of permission from state authorities before suit in State courts upon a transaction in in-

terstate commerce is brought, is an unconstiutional burden upon such commerce.

Many cases to this effect might be cited, but we will content ourselves by inviting attention to the language in a very few.

In *Sioux Remedy Company* v. *Cope* (235 U. S., 197, 59 L. Ed., 193), the statute under consideration, like the Missouri Statute in the instant case, provided that no suit might be brought by a foreign corporation, which had not obtained a license and the requirements therefor were substantially the same as those under this Missouri Statute. This Court in the course of an opinion holding such requirement an improper burden on interstate commerce, said at page 201:

> "The contract and sale out of which the action arose (202) were transactions in interstate commerce, and entirely legitimate notwithstanding the plaintiff's non-compliance with the State statute * * * After delivery of the merchandise according to the contract, the plaintiff was lawfully entitled to the purchase price. The defendants were likewise obligated to pay it. And by reason of their refusal the plaintiff had a right of action on the contract."

In disposing of the contention that the State, while unable in view of the Commerce Clause of the Constitution, to declare the contract invalid, yet could refuse access to its courts unless its laws had been complied with, this Court says at the bottom of page 202:

> "Of the first point it is enough to say that the right to demand and enforce payment for goods sold in interstate commerce, is so directly (203) connected with it and is so es-

> sential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce."

In *Allen* v. *Pullman's Palace Car Co.* (191 U. S., 171, 48 L. Ed., 134), this Court condemned a State enactment which in terms imposed an identical burden on inter and intrastate commerce, employing the following language at page 180:

> "The statute now under consideration requires payment of the sum exacted for the privilege of doing any business, when the principal thing to be done is interstate traffic. We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business, which the Legislature, in the terms of the act, impose upon the entire business of the company. We are of opinion that taxes exacted under the Act of 1887 are void as an attempt by the State to impose a burden upon interstate commerce."

The decision of the Circuit Court of Appeals of the Eighth Circuit in *Butler Brothers Shoe Company* v. *United States Rubber Company* (156 Fed., 1), which was cited with approval by this Court in *International Text Book Company* v. *Pigg* (217 U. S., 91, at page 107, 54 L. Ed., 678), is extremely illuminating upon several points which are of interest in the instant case. Upon the point under discussion, this Court says at page 16:

> "The Constitution and statutes of Colorado prohibit every foreign corporation from doing business and from exercising any corporate power in that State until it pays the fees and the annual license tax and complies with the

other requirements of its statutes. The result is that in so far as this Constitution and these statutes forbid or obstruct the exercise by a foreign corporation of its right to use the necessary corporate powers to carry on interstate commerce and to maintain and defend its suits in the federal courts, they are repugnant to the Constitution and laws of the nation and ineffective."

A final quotation on this point may be taken from the decision of this Court in *Western Union Telegraph Company* v. *State of Kansas* (216 U. S., 1, 54 L. Ed., 355), in which we read at page 27:

"If the statute reasonably interpreted either directly or by its necessary operations, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This Court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

Many additional quotations enunciating the same rule of law could be given from adjudications of this and other courts. A few have been collected and noted in Points I and II of this brief. It is therefore submitted that the position taken by the concurring opinion of Judge Sturgis of the Springfield Court of Appeals in the opinion on the appeal, is unquestionably sound, namely, that the transactions of plaintiff-in-error other than as directly involved in its acts with defendants-in-error are immaterial in the consideration of its right to recover in the instant case, since if its acts in the instant case constitute a transaction in interstate commerce, the Missouri Statutes cannot

impose a burden thereon in consequence of prior intrastate transactions.

The next question to which attention is invited, is as to whether the acts of plaintiff-in-error as disclosed by the record in the instant case constituted a transaction in interstate commerce or not. The discussion of this question naturally divides itself into three main headings: *First,* as to what facts in the record are relevant in determining the nature of the dealings between the parties; *secondly,* whether, assuming that a lease, as distinguished from a sale, can constitute interstate commerce, the plaintiff-in-error did anything which would destroy the interstate character of the transaction, and *thirdly,* whether a transaction of lease between citizens of different States under the pertinent facts as here existing is a transaction in interstate commerce within the intent and meaning of Section Eight of Article One of the Federal Constitution.

While it is unquestionably true that in many cases this Court will be held bound by a finding of fact made by Courts below, such is not the rule in a case like the present, as was noted by this Court in *Interstate Amusement Company* v. *Albert* (239 U. S., 560, 60 L. Ed., 439) where the following appears at page 566:

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this Court * * *. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal (567) right has been denied as the result of a finding that is without support in the evi-

dence. Southern P. Co. *v.* Schuyler, 227 U. S., 601, 611, 57 L. Ed., 662, 669; North Carolina R. Co., *v.* Zachary 232 U. S., 248, 259, 58 L. Ed., 591, 595; Carlson *v.* Washington, 234 U. S., 103, 106, 58 L. Ed., 1237, 1238."

The facts, as disclosed by the record naturally fall into two classes, *first*, the general methods of dealing and transactions by plaintiff-in-error with residents of Missouri, other than in the present transaction, and, *secondly*, the transactions between plaintiff and defendants-in-error in the instant case. The first class of facts are, under the decisions above cited irrelevant in the determination, since if we were to grant, which is by no means done, that all of the former dealings between plaintiff-in-error and residents of Missouri were beyond the scope of interstate commerce, yet, such fact would be no answer to this particular action if the actions and facts in the instant transaction show it to have been an interstate commerce transaction.

Turning, then, to the transactions between the parties to this action, we are again met by a dividing line, in that whereas the contract between the parties contained a very considerable number of clauses, many of which were optional at the election of the defendants-in-error, only as to a very few of them did obligations by either partly ever accrue, and it would seem self-evident that only those provisions of the lease are pertinent which resulted in the raising of some obligation. In determining whether a particular transaction is one in interstate commerce, the question, it is believed, is always: "What acts were done?" and in deciding whether they can properly come within an inhibition against doing business in a particu-

lar state, the question must be: "What did the party against whom the inhibition is offered as a defense, do in that State?" A lengthy citation of authorities to establish this point would seem superfluous, and we will content ourselves with a reminder of the language used in *South Covington & Cincinnati Street Railway Company* v. *City of Covington* (235 U. S., 537, 59 L. Ed., 350) where this Court says at page 545:

> "This Court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between States, the mere arrangements of billing or plurality of carriers do not enter into the conclusion."

What then are the facts as disclosed by the record with respect to the transactions between the parties in this case? Plaintiff-in-error, a New York corporation (Rec., pp. 3, 78) sent its travelling salesman into Missouri (Rec., p. 27). The latter solicited an order from defendants in Missouri (Rec., pp. 14, 65, 71), which was mailed by him to Chicago (Rec., pp. 14, 19, 65, 71), and, after investigation, mailed to New York for approval or disapproval (Rec. pp. 15, 19, 23, 33, 65, 71), it being distinctly understood that such order was in no way binding upon plaintiff-in-error until it was approved (Rec. pp. 15, 19, 28, 65, 71). Such approval was given to it, and in its accepted form, it was remailed from New York to defendants in Missouri (Rec., pp. 9, 19, 23, 65, 71). Somewhat later plaintiff-in-error made out in New York a form of lease and mailed it to defendants in Missouri, where it was executed by them (Rec., pp. 9,

19, 23) and remailed to plaintiff in New York, after which plaintiff also signed the lease in New York and mailed a copy to defendants in Missouri (Rec., pp. 9, 19, 23, 24, 27). Pursuant to the terms of the lease plaintiff-in-error delivered to defendants in New York, the linotype machine in question and defendants paid to plaintiff in New York the specified rental for the first year (Rec., p. 9). Plaintiff in New York directed insurance to be taken out on the machine and paid the premiums therefor in New York (Rec., p. 22). Defendants, through the agency of the railroad moved the machine to Missouri as was contemplated in the lease, and set it up in their place of business. It inferentially appears that an employee of plaintiff called at the place of business of defendants in Missouri about once a year and looked at the machine (Rec., p. 25), but so far as several careful readings of the record has been able to disclose to us, plaintiff did no other act of any kind or description in Missouri in this transaction until it instituted the present suit. Not only this, but under the terms of the contract of lease and the actions of the parties it was under no obligation to do anything else. It may be said that had defendants elected, plaintiff might have been required to send a man to install the machine or to operate it, or to repair it. The plain answer is that they did not so elect, and so plaintiff never did any of these acts, and it is extremely doubtful on the authorities cited, under Point IV, *supra*, whether they would have been doing an act beyond the proper scope of a transaction in interstate commerce, had they done any or all of these things. And what were the acts which, on the

facts of the transaction, defendants were obliged to perform? They were under obligation to pay the rental instalments to plaintiff-in-error in New York (Pars. 5th and 11th, Rec., p. 12), to refund the sums paid by plaintiff-in-error for insurance premiums, such sums being refundable in New York (Par. 9th, Rec., p. 12) and finally at the termination of the lease they were under obligation to return the machine to plaintiff-in-error in New York (Par. 10th, Rec., p. 12). This suit was brought for breach of the first two of such three obligations. During this time, plaintiff-in-error had no office for the transaction of business, no bank account, nor resident agent in the State of Missouri and none of its products were made or stored in that State (Rec., pp. 9, 22, 23, 31, 35, 73, 74). Saving only the question of whether it is possible for a concern to lease property in interstate commerce, it is submitted that it would be impossible to imagine a transaction in which the interstate character of the dealings was clearer or more carefully preserved.

It will be noted that in only two particulars did plaintiff-in-error do anything in the State of Missouri. The first was in the solicitation by its drummer or salesman. At this late date no one would have the temerity to assert that this act withdrew from the transaction its interstate character. Should any one advance such a position, the reading of any of the cases cited under Point IV, *supra*, would quickly convince him of his error. The other act, that of having an employee call and look at the machine on four or five occasions, could hardly be called "doing business" in any case. Even could such a designation be given to the

action, it is certainly much less of an intrastate action than many others which have been held by this Court to be entirely consonant with the preservation of the interstate character of a transaction.

The general theory of this question is clearly shown in the language of this Court in *Davis* v. *Commonwealth of Virginia* (236 U. S., 697, 59 L. Ed., 795), where we read at page 698:

> "The preliminary contract bound the company to furnish a chance to take a frame with the portrait. Obviously it was contemplated that the frames would be sent from New York as well as the pictures, as (699) in practice they were, and although the bargain was not complete until the company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. From the point of view of commerce, the business was one affair. Dozier *v.* Alabama 218 U. S., 124, 54 L. Ed., 965; Crenshaw *v.* Arkansas, 227 U. S., 389, 57 L. Ed., 565; Browning *v.* Waycross, 233 U. S., 16, 21, 58 L. Ed., 828, 832."

One other decision in which this thought is developed to a somewhat greater extent is *York Manufacturing Company* v. *Colley* (247 U. S., 21, 62 L. Ed., 963) where the question was whether the furnishing of a superintendent at $6.00 a day to erect the ice machine, which was the subject of the transaction, was an act which would destroy the interstate character of the transaction. In holding that it was not, this Court says at page 24:

> "As, in the second place, since the ruling in M'Culloch *v.* Maryland, 4 Wheat, 316, 4 L. Ed., 579, there has been no doubt that the interstate commerce power embraces that

which is relevant or reasonably appropriate to the power granted, so also from such doctrine there can be no doubt that the right to make an interstate commerce contract includes in its very terms the right to incorporate into such contract provisions which are relevant and appropriate to the contract (25) made. The only possible question open, therefore, is, was the particular provision of the contract for the service of an engineer to assemble and erect the machinery in question at the point of destination and to practically test its efficiency, before complete delivery relevant and appropriate to the interstate sale of the machinery? When the controversy is thus brought in last analysis to this issue there would seem to be no room for any but an affirmative answer. Generically this must be unless it can be said that an agreement to direct the assembling and supervision of machinery whose intrinsic value largely depends upon its being united and made operative as a whole is not appropriate to its sale. The consequence of such a ruling, if made in this case, would be particularly emphasized by a consideration of the functions of the machinery composing the plant which was sold, of its complexity, of the necessity of its aggregation, and unison with mechanical skill and precision in order that the result of the contract of sale—the ice plant purchased—might come into existence. In its essential principle, therefore, the case is governed by Caldwell *v.* North Carolina, 187 U. S., 622, 47 L. Ed., 336, * * *."

It is further submitted that were it necessary, the principle here enunciated is broad enough to cover any one of the things which it is shown by the record that plaintiff did in transactions with other residents of Missouri, or which the contract

of lease provided should be done by plaintiff in this case at the election of the lessee; namely, to furnish a man to erect, or to act as an employment agency in case an operator was required, or to furnish a skilled repair man—any and all of whom were to be paid for by the lessee. As in the York case, so in the present case, the transaction involved the placing of an expensive and complicated machine, and it may well be that interstate commerce in such a machine would be greatly lessened if not entirely suppressed unless the manufacturer stood ready to furnish men who could put it into working order, operate it and repair it if it fell into disrepair. Particularly in the smaller communities, this might well be a *sine qua non* to successful utilization of the machine. It is also clear that in each of these agreements the plaintiff-in-error simply agreed to act as an employment agency, and that the user of the machine was to pay the wages and expenses of the man, whom he desired for the purpose of putting and keeping the machine in usable condition. However this may be, it is submitted that aside from the question of the inspection, which was obviously for the purpose of seeing that the machine was continued in first class workable condition, the question is purely academic in the instant case under the decisions above cited, since plaintiff-in-error did none of these things.

Whereas the facts in the two cases are quite dissimilar in many particulars, the discussion of the facts in the case of *Butler Brothers Shoe Company* v. *United States Rubber Company* (156 Fed., 1) at page 19, is of considerable interest in this connection.

This brings us face to face with the main question in the case, which, it is believed, has never before been directly presented for the consideration of this Court. That question is whether a transaction of lease between the citizens of different States can constitute a dealing in interstate commerce within the intent and meaning of Section Eight of Article One of the Federal Constitution. Whereas no definition of "commerce" specifically including a lease has ever been enunciated by this Court, it is submitted that a transaction of lease is well within the scope of the many general definitions which have from time to time been formulated. Attention is invited to a few of these.

The classic decision of *Gibbons* v. *Ogden* (9 Wheat. 1) defines commerce under this clause of the Constitution as follows, at page 189:

> "It describes the commercial intercourse (190) between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on the intercourse."

At page 193 the following appears:

> "To what commerce does this power extend? The constitution informs us, to commence 'with foreign nations, and among the several States, and with the Indian Tribes.'
>
> "It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried (194) on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the

Constitution, is a unit, every part of which is indicated by the term."

Again at page 195:

"This principle is, if possible, still more clear, when (196) applied to commerce 'among the several States.'"

Some of the other definitions, and conceptions of commerce as stated by this Court are as follows:

Savage v. *Jones*, 225 U. S., 501 (56 L. Ed., 1182) at page 519:

"In answer, it must again be said that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' Swift & Co. *v.* United States, 196 U. S., 375, 398, 49 L. Ed., 518, 525."

Pensacola Telegraph Company v. *Western Union Telegraph Company*, 96 U. S., 1 (24 L. Ed., 708), at page 9:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from horse with the rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the gen-

eral government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

Re Debbs, 158 U. S., 564 (39 L. Ed., 1092), at page 591:

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation, it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

International Text Book Co. v. *Pigg*, 217 U. S., 91 (54 L. Ed., 678), at page 106:

"It is true that the business in which the International Text Book Company is engaged is of a somewhat exceptional character, but, in our judgment, it was, in its essential characteristics, commerce among the States within the meaning of the Constitution of the United States. It involved, as already suggested, regular and practically continuous intercourse between the Text Book Company, located in

Pennsylvania, and its scholars and agents in Kansas and other States."

Butler Brothers Shoe Company v. *United States Rubber Company* (156 Fed., 1) at page 17, (cited and applied by this Court in International Text Book Company *v.* Pigg, 217 U. S., 91 [54 L. Ed., 678], at page 107):

> "all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

Heyman v. *Hays*, 236 U. S., 178 (59 L. Ed., 527), at page 187:

> "* * * But this is immaterial since it is not open to controversy that substance, and not form controls in determining whether a particular transaction is one of interstate commerce, and hence that the mere method of delivery is a negligible circumstance if, in substantial effect, the transaction under the facts of a given case is interstate commerce."

Rearick v. *Commonwealth of Pennsylvania*, 203 U. S., 507 (51 L. Ed., 295), at page 512:

> "'Commerce among the several States,' is a practical conception, not drawn from the 'witty diversities' (Yaites *v.* Gough, Yelv. 33) of the law of sales. Swift & Co. *v.* United States, 196 U. S., 375, 398, 399, 49 L. Ed., 518, 525, 526."

Welton v. *State of Missouri*, 91 U. S., 275 (32 L. Ed., 347), at page 280:

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."

Adair v. *United States*, 208 U. S., 161 (52 L. Ed., 436), at page 176:

"Let us inquire what is commerce, the power to regulate which is given to Congress?

"This question has been frequently propounded in this Court, and the answer has been—and no more specific answer could (177) well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States—but not that commerce 'completely internal, which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States.' The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed."

Among the almost innumerable decisions of the lower Federal and the State Courts, the following decisions following the lead of this Court are worthy of note:

Pacific Export Company v. *Seibert*, 44 Fed., 310 (affirmed by this Court, 142 U. S., 339; 35 L. Ed., 1035), at page 316:

"Interstate commerce is not 'business done

within the State of Missouri, it is business done between two or more States.'"

Charge to Grand Jury, 151 Fed., 834, at page 839:

"Therefore, if any commercial transaction reaches an entirety in two or more States, and if the parties dealing with reference to that transaction deal from different States, then the whole transaction is a part of the interstate commerce of the United States."

La Moine Lumber & Trading Company v. *Kesterson*, 171 Fed., 980, at page 983:

"'Commerce,' says Mr. Pomeroy [Pomeroy on Constitutional Law, p. 376], 'includes the fact of intercourse and of traffic, and the subject matter of intercourse and traffic. The fact of intercourse and traffic again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the acts of carrying them on at these places, and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons.'"

United States v. *Tucker*, 188 Fed., 741, at page 743:

"Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any State or Territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

Loverin & Brown Company v. *Travis*, 135 Wis., 322, at page 331:

> "It cannot now be doubted that 'commerce' in the Federal Constitution comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities."

From these diverse yet similar pronouncements, it is possible for us by combining and paraphrasing their language to formulate a reasonably precise statement as to what matters are embraced within the purview of this vastly important constitutional guaranty.

Interstate commerce is a term of the largest import (Welton v. Mo.) and is a practical conception (Rearick v. Pa.) drawn from the course of business, and not a technical legal one (Savage v. Jones). The substance and not form controls in determining whether a particular transaction is one of interstate commerce (Heyman v. Hays). It is not all sales of goods, but it includes every contract, trade and dealing between citizens of different States which contemplates and causes importation (Int. Text-Book Co. v. Pigg and Butler Bros. Co. v. U. S. Rubber Co.). It includes every species of commercial intercourse (Adair v. U. S.) and no sort of trade can be carried on between one State and another to which this power does not extend (Gibbons v. Ogden). Its operation extends to new matters as the modes of business and the habits of life of the people vary (Re Debbs); it keeps pace with the progress of the country, and adapts itself to the new developments of time and circumstances

(Pensacola Co. v. Western Union Company). Therefore, if any commercial transaction reaches an entirety in two or more States, and if the parties dealing with reference to that transaction deal from different States, then the whole transaction is a part of the Interstate Commerce of the United States (Charge to Grand Jury, Pacific Co. v. Seibert, U. S. v. Tucker, Loverin Co. v. Travis).

If this definition and description is a correct outline of interstate commerce within the Constitutional enactment, and it is submitted that this is incapable of successful denial, the applicability thereof to the transaction in the instant case would seem little less than self-evident. Here we have an expensive machine designed to alter the course of the trade to which it is applicable. Like other revolutionary inventions its value must be demonstrated to a particular prospective customer in the daily routine of his business before he can be induced to venture upon so large an expenditure. He must be convinced that it will pay him in his own business before he will either definitely part with so much money or finally bind himself to do so. The experiences of others with similar machines have inclined him to the belief that the machine will more than pay for itself, but as a matter of sound business policy he must know from actual personal experience and not be obliged to gamble, perhaps the major part of his capital on the experiment. The method of dealing of the plaintiff-in-error as shown in this case enables him to do so without risk of a crippling loss in the event that the machine proves inapplicable to his business. For a sum of less than $1.75

a day, he is enabled to rent a machine with full equipment and test it for a year in his business. After such test, if he finds the machine inapplicable to his business or for any other reason desires to do so, he can cancel the lease, return the machine and his obligations are at an end. If he finds that the machine is sufficiently valuable to him during this trial period, he has the option to purchase outright and receive credit for the rental he has paid, and the record shows that such option is "almost universally exercised" (Rec., p. 24). Finally the customer has the third option of continuing the lease for the remaining term of five years.

It is respectfully submitted that not only is this method of dealing legally unexceptionable as a transaction in interstate commerce but, from a practical standpoint, it is the only way in which a corporation marketing a new and revolutionary invention could successfully prosecute and expand its business without becoming subject to the substantially prohibitive expense which separate authorization in each individual State would entail.

The progress of trade, the exigencies of new modes of transacting business and newly invented devices require the extension, if extension it be, of the protection of the interstate commerce clause of the Constitution to transactions of business of this sort as is plainly contemplated in the language of this Court in many of the cases above cited.

It will be recalled that the Supreme Court of Missouri in the certiorari proceeding in this case held (Rec., p. 76) that a transaction in which "the

title to the commodity does not pass" could not constitute interstate commerce within the meaning of the interstate commerce clause of the Constitution. It might, of course, be argued that a lease of the machine was a sale of the use for a specified time which, during the continuance of the term, as fully divested the lessor of the complete ownership, as he would be divested in the case of a sale. Such argument is, however, unnecessary in view of the approval by this Court of the language of Judge Sanborn in the case of *Butler Brothers Shoe Company* v. *United States Rubber Company*, above noted. Whereas that opinion and its approval by this Court definitely establishes that the position of the Supreme Court of Missouri is incorrect, it is not a direct ruling by this Court that a lease is interstate commerce. Fortunately, however, we are not without direct decisions in well considered cases on this precise point.

The first of these cases to which attention is invited is that of *United States* v. *United Shoe Machinery Co.* (234 Fed., 127). This was a suit in equity to enjoin the defendant from enforcing certain provisions of leases of shoe manufacturing machinery on the ground that they violated the Clayton Act. The Court in denying a motion to dismiss, says, at page 143:

> "Counsel for defendants challenge the constitutionality of so much of Section 3 of the Clayton Act as applies to leases. It has been earnestly and ably argued that a lease is no more commerce than insurance or manufacturing, and it is claimed, if not commerce, it cannot be interstate commerce. The diligence of the able counsel has not been rewarded by

finding any authority which has determined that question."

After a careful consideration of authorities, the Court continues at page 145:

> "It is sufficient to say that as new methods of transacting business are devised, if they are found to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the Commerce Clause of the Constitution.
>
> "The bill charges that the machinery manufactured by the defendants is leased for the purpose of enabling the lessees to manufacture shoes; that they deal with over 1,500 shoe manufacturers in all parts of the United States, and, when the leases are made, the machinery is shipped by the defendants from the State of Massachusetts, the place of manufacture, to other States of the Union and to foreign countries. Upon these facts there can be no other conclusion than that the defendants are engaged in interstate commerce, and subject to be regulated by Congress."

The same result was reached in an earlier decision on an application for a preliminary injunction against this same defendant, *United States* v. *United Shoe Machinery Company*, 227 Fed., 507, 510.

The question involved in *Vulcan Steam Shovel Co.* v. *Flanders* (205 Fed., 102), was as to the abil-

ity of a foreign corporation which had not complied with Michigan corporation laws to sue for the purchase price of a steam shovel which had originally been leased to a resident of Michigan, transported to that State, and after the lessee's default, sold by the manufacturer to defendant, another resident of Michigan. The record showed that plaintiff's methods of business were very similar to those of plaintiff-in-error in the instant case. The Court in holding that plaintiff's noncompliance with Michigan laws would not defeat this action, said at page 104:

> "The transaction involved in this suit is interstate commerce, and therefore no certificate was necessary. The lease between Jones and the plaintiff and the bringing of the shovel into this State was interstate commerce. The court is satisfied that this sale to the defendant stands on no different basis than it would if the original shipment to Jones had been on a contract for sale, which for some reason had been forfeited, instead of on a contract for lease. Sioux Remedy Co. *v.* Cope, 28 S. D., 397, 133 N. W., 683 (1911); Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed., 1, 84 C. C. A., 167; International Text-Book Co. *v.* Pigg, 217 U. S., 107, 54 L. Ed., 678. The original shipment of the shovel into this State being interstate commerce, and the lease having been forfeited, the plaintiff had a right to sell it to the defendant here in Michigan, and by so doing was not doing business in this State, and did not violate Act No. 310 of the Public Acts of 1907."

In *Bogata Mercantile Company* v. *Ootcault Advertising Company* (184 S. W. Rep., 333), the question presented to the Texas Court of Civil Appeals was whether suit on a contract for an

advertising service ordered by mail from a foreign State and which consisted principally of certain advertising cuts and type which were to be returned when the contract expired, could be defeated on the ground of its infringement of the Texas anti-trust laws. In holding that it could not the Court says at page 334:

> "The transaction between appellant and appellee evidenced by the contract was interstate commerce and hence not subject to the anti-trust laws of this State."

In conclusion, attention is invited to the facts in the cases of Butler Shoe Company *v.* United States Rubber Company (156 Fed., 1, at page 19), and in Vermont Farm Machinery Co. *v.* Hall (80 Oregon, 308, at pages 319 and 320), which are too long for insertion here. Both of these cases involved shipments of goods to foreign States on consignment with retention of title in the shipping corporation, and in each, it was held that the transaction was within the protection of the interstate commerce clause of the Federal Constitution.

It is therefore submitted that since the only facts respecting the transaction in the instant case, which are relevant to a determination of whether it was or was not a dealing in interstate commerce, are those which actually took place with defendants-in-error, and since these facts fall far short of showing an intrastate transaction in the State of Missouri, aside from the question of whether a lease of property in interstate commerce is within the meaning of Section Eight of Article One of the Federal Constitution, and since both on principle and authority a lease upon the

facts here shown to exist is within the protection of that section of the Constitution, that the judgment below was erroneous, and should be reversed.

New York City, December 22nd, 1919.

Respectfully submitted,

BRADFORD BUTLER,
Attorney for Plaintiff-in-Error.
Mergenthaler Linotype Company.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 620. 192

OCTOBER TERM, 1918.

MERGENTHALER LINOTYPE COMPANY, a Corporation,
Plaintiff in Error,
vs.
SAMUEL W. DAVIS and W. B. HAYS,
Defendants in Error.

In Error to the Springfield Court of Appeals of the State of Missouri.

MOTION OF DEFENDANT IN ERROR W. B. HAYS TO DISMISS WRIT OF ERROR, NOTICE THEREOF, AND STATEMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS.

ERNEST A. GREEN,
Attorney for Defendant in Error W. B. Hays.

J. C. SHEPPARD and
A. L. SHEPPARD,
Of Counsel.

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Cases Cited.

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MOTION OF DEFENDANT IN ERROR W. B. HAYS TO DISMISS THE WRIT OF ERROR.

Now comes the defendant in error herein, W. B. Hays, and moves this Honorable Court to dismiss the writ of error in the above-entitled cause, for the rea-

son that this Court is without jurisdiction to entertain the writ of error herein.

ERNEST A. GREEN,
Attorney for Defendant in Error W. B. Hays.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR.

To the Mergenthaler Linotype Company, a Corporation, Plaintiff in Error, and to Messrs. Abbott and Edwards, Attorneys for said Plaintiff in Error:

Please take notice that on the 8th day of December, A. D. 1919, on the convening of the Supreme Court of the United States at Washington, D. C., on that day, or as soon thereafter as counsel can be heard, the defendant in error, W. B. Hays, will submit for the consideration of said Court the foregoing motion to dismiss the writ of error and the brief in support thereof, hereto attached.

ERNEST A. GREEN,
Attorney for Defendant in Error.

We do hereby acknowledge to have received copies of the foregoing notice, together with copies of the motion referred to, and brief in support thereof, this 18th day of November, 1919.

ABBOTT & EDWARDS,
Attorneys for Plaintiff in Error.

STATEMENT.

This is an action instituted by the plaintiff in error to recover the amount of rental alleged to be due it under an alleged contract of lease. The amended petition on which the case was tried is set out in the transcript of record at pages 3 and 4. To this amended petition the defendant in error W. B. Hays filed his separate amended answer, which pleaded in substance that the plaintiff was a foreign corporation, transacting business in Missouri in violation of law, and, therefore, under the provisions of Sections 3039-3040, Revised Statutes of Missouri 1909, could not maintain this action (Tr., pp. 5 and 6). The plaintiff thereupon filed its replication, which was a general denial. **In this replication no attack whatever was made upon the constitutionality of the statutes referred to in defendant's answer** (Tr., p. 6). The case was tried at the January Term, 1915, of the Butler County Circuit Court of the State of Missouri, resulting in a judgment in favor of the plaintiff (Tr., p. 6). Thereupon, defendant in error W. B. Hays appealed to the Springfield Court of Appeals (Tr., p. 7). That court, at the October Term, 1915, rendered a judgment affirming the judgment of the Butler County Circuit Court (Tr., pp. 64 to 69). The

Court will note that in the opinion of the Springfield Court of Appeals, no question as to the constitutionality of the statutes set out in defendant's answer was discussed, and at no place in the abstract of record filed by defendant in error in the Springfield Court of Appeals is the question of the constitutionality of the statutes above referred to involved.

Immediately upon the rendition of the judgment of the Springfield Court of Appeals defendant in error W. B. Hays sued out in the Supreme Court of the State of Missouri his writ of *certiorari* to quash the judgment and opinion of the Springfield Court of Appeals. On the 30th day of June, 1917, the Supreme Court of the State of Missouri, the highest appellate court in the State of Missouri, rendered its judgment in the *certiorari* proceeding, quashing the judgment and opinion of the Springfield Court of Appeals in this case (Tr., pp. 69 to 77). **In the Supreme Court of the State of Missouri no question was raised, nor does the opinion discuss or in anywise refer to the constitutionality of the state statutes set out in defendant's answer. No motion for a rehearing was filed in the Supreme Court of the State of Missouri, and no writ of error sued out to this Court from the final judgment of the Supreme Court of the State of Missouri** (Tr., p. 77). Thereupon, on the 11th day of March, 1918, the Springfield Court of Appeals, **in obedience to the opinion of the Supreme Court, and**

in obedience to the constitutional mandate of the State of Missouri, rendered its judgment reversing the judgment in favor of the plaintiff in error (Tr., pp. 77 to 85).

No question whatever appeared in the last opinion of the Springfield Court of Appeals, nor was there any presented to that court, involving the constitutionality of the Statutes of the State of Missouri. Thereupon, at the March Term, 1918, the plaintiff in error, Mergenthaler Linotype Company, filed in the Springfield Court of Appeals its motion for a rehearing (Tr., pp. 85 to 88). **For the first time there appears in the record in this case a question involving the constitutionality of Sections 3037-3040, Revised Statutes of Missouri, 1909. Thus, your Honors will note that, although this case had been pending for six years, and had been three times passed on by the Springfield Court of Appeals, and once by the Supreme Court of the State of Missouri, no question of the constitutionality of the statutes on which the defendant in error's defense was based, was raised until after the final opinion of the Springfield Court of Appeals, on a motion for rehearing thereon;** and this is true, notwithstanding the fact that, under the Constitution of the State of Missouri, the Springfield Court of Appeals has no jurisdiction of questions involving the constitutionality of State statutes, nor of questions involving rights claimed under the Fed-

eral Constitution. The judgment of the Supreme Court (the only court which has jurisdiction to pass upon the constitutionality of the State Statutes) was a final judgment, quashing the original opinion of the Springfield Court of Appeals on *certiorari*, and no writ of error nor of *certiorari* was sued out by plaintiff in error to this court. The Springfield Court of Appeals, on March 30, 1918, overruled plaintiff in error's motion for rehearing (Tr., p. 88). Thereupon, plaintiff in error sued out a writ of error to this Court (Tr., pp. 89 to 104). Defendant in error, W. B. Hays, contends that this writ of error should be dismissed for two reasons. First, because a writ of error does not lie in this case, since there was no question involved as to the constitutionality of any statute of the State of Missouri; second, because, even of a writ of error would lie, it should have been sued out from the decision of the Supreme Court of the State of Missouri, the highest court of the State of Missouri in which a decision on this suit and matter was had.

POINTS AND AUTHORITIES.

I.

This Court is without jurisdiction to review the decision of the Springfield Court of Appeals of the State of Missouri upon a writ of error.

Section 237 of the Judicial Code as amended by the Act of Congress approved Sept. 6, 1916;

39 Statutes at Large, C. 448, Sec. 7, p. 728, 2 Comp. Statutes 1916, p. 1580, Sec. 1214;

Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U. S. 162.

II.

This Court is without jurisdiction because it appears from the record that the suit is one which does not really and substantially involve a dispute or controversy which depends upon the construction of the Constitution of the United States.

III.

The assertion of a right, title, privilege or immunity under the Federal Constitution must be specially

set up or claimed in the State Court, in order to authorize a review in this Court.

Eastern Building & Loan Ass'n v. Welling, 181 U. S. 47;
Michigan Sugar Co. v. Dix, 185 U. S. 112;
F. G. Oxley Stave Co. v. Butler Co., 166 U. S. 648.

IV.

Assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below.

Ansbro v. U. S., 159 U. S. 695, *l. c.* 698;
Muse v. Arlington Hotel Co., 168 U. S. 430-435;
Cornell v. Green, 163 U. S. 75, *l. c.* 79.

V.

This Court is without jurisdiction of this writ of error because *certiorari* would be the only proper method of reviewing this judgment, since there is no question involved in this case as to the constitutionality of a State statute.

Hartford Life Ins. Co. v. Johnson, U. S. Advance Opinions, 1918-19, decided April 14, 1919, page 392.

VI.

The writ of error should be dismissed because not sued out from the highest court of the State of Missouri in which a final decision in this suit and matter was had.

Section 12, Art. VI, Constitution State of Missouri;
Section 3, Amendment of 1884, Constitution of Missouri;
Section 5, Amendment of 1884, Constitution of Missouri;
Section 6, Amendment of 1884, Constitution of Missouri;
Craycroft v. Railroad, 18 Mo. App. 487;
State *ex rel.* v. Kansas City Court of Appeals, 105 Mo. 299;
State *ex rel.* v. Smith, 141 Mo. 1;
Collins v. Life Ass'n, 85 Mo. App. 242;
Woody v. Railway, 173 Mo., *l. c.* 549;
State *ex rel.* v. Smith, 176 Mo. 44;
Lohmeyer v. Cordage Co., 214 Mo. 685;
Kreyling v. O'Reilly, 97 Mo. App. 384;
Hartzler v. Railway, 218 Mo. 562;
State v. Metcalf, 65 Mo. App. 681;
Town of Kirkwood v. Meramec, Etc., 94 Mo. App. 637;
Shewalter v. Railway, 152 Mo. 544;
M., K. & T. Railway v. Smith, 154 Mo. 300;
Harburg v. Arnold, 87 Mo. App. 326;
Thompson v. Irwin, 76 Mo. App. 418;
Sage v. Reeves, 17 Mo. App. 210;

Mo., Etc., Railway v. Smith, 154 Mo. 300;
Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S., *l. c.* 31;
Stratton v. Stratton, 239 U. S. 55;
Atlantic Coast Line Co. v. Mimms, 242 U. S., *l. c.* 535;
Railroad Co. v. Cleveland, 235 U. S., *l. c.* 53.

VII.

Under the decisions of the Courts of Missouri, the constitutional question in this case, in order to be available to the plaintiff in error, should have been raised in the reply filed by plaintiff in error to defendant in error's answer; not having been so raised, there is no constitutional question in this case; this Court, in determining whether a constitutional question has been raised, abides by the rule followed by the Missouri Supreme Court.

Authorities under Point VI, *supra.*

BRIEF AND ARGUMENT.

I.

This case comes here upon a writ of error directed to the Springfield Court of Appeals of the State of Missouri. Neither the record proper nor the opinion of the Court of Appeals nor the entire abstract of the record discloses that there was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, or that there was drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution of the United States. The only reference to any constitutional question appears in the motion for a rehearing in the Springfield Court of Appeals (Tr., pp. 85 to 88), and in the assignment of errors (Tr., pp. 95 to 97), where it is for the first time stated that the decision of the Springfield Court of Appeals is contradictory to certain provisions of the Federal Constitution.

Therefore, under the provisions of Section 237 of the Judicial Code, as amended by the Act of Congress approved September 6, 1916 (39 Statutes at Large, c. 448, Section 7, page 728; 2 Comp. Statutes

1916, page 1518, Section 1214), this Court is without jurisdiction to review the action of the Supreme Court of the State of Missouri upon a writ of error.

In the case of Philadelphia & Reading Coal & Iron Company v. Gilbert, 245 U. S. 162, *l. c.* 164, this Court says:

> "If the suit be one * * * 'where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority' the judgment or decree can be reviewed in this court only upon a writ of *certiorari.*"

II.

Record Does Not Disclose Any Constitutional Question.

It has many times been held by this Court that in order to enable a party to secure a review of a decision which is claimed to violate some right that he has under the Constitution of the United States, the right so claimed to have been violated must be presented to the lower court in such manner as that the record will show the question involved; otherwise a review thereof cannot be had in this Court.

Thus, in the case of Western Union Telegraph Company v. Ann Arbor Railroad Company, 178 U. S. 239, 243, the Court says:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does **really** and **substantially** involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground (Gold Washing & Water Co. v. Keyes, 96 U. S. 199; Blackburn v. Portland Gold Mining Co., 175 U. S. 571)."

See, also, the cases of

> Chapin v. Frye, 179 U. S. 127, 129;
> Arkansas v. Schlierholz, 179 U. S. 598, 601.

An examination of the foregoing statement and the transcript of the record herein will disclose that there is no suggestion whatever of the violation of any right under the Constitution of the United States, except as such claim is disclosed by the assignment

of errors and motion for rehearing filed in the Springfield Court of Appeals.

III.

No Right, Title, Privilege or Immunity Was Claimed.

But not only does the record fail to show that a constitutional question was involved, but the record also fails to show (except in the motion for a rehearing in the Court of Appeals and in the assignment of errors) that there was especially set up or claimed any right, title, privilege or immunity under the Constitution of the United States. The statute requires, and this Court has held, that unless the record shows that such right, title, privilege or immunity was "especially set up or claimed" in the State Court, such question cannot be considered here.

In Eastern Bldg. and Loan Assn. v. Welling, 181 U. S. 47, 49, the Court says:

> "The assertion that, although no federal question was raised below, and although the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a concluded line of authority. * * * The error involved in the argument arises from failing to observe that the particular character of federal

right which is here asserted is embraced within those which the statute requires to be 'specially set up or claimed'."

See, also:

Michigan Sugar Co. v. Dix, 185 U. S. 112;
F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648.

IV.

Assignment of Errors Cannot Import Constitutional Question Into Case.

It has also been uniformly held by this Court that constitutional questions are not properly presented when they appear for the first time in the assignment of errors.

Thus, in the case of Ansbro v. United States, 159 U. S. 695, 698, the Court states:

"An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

See, also:

Cornell v. Green, 163 U. S. 75, 79;
Muse v. Arlington Hotel Co., 168 U. S. 430, 435;
Chapin v. Frye, 179 U. S. 127.

V.

Writ of Error Not Sued Out From Highest Appellate Court in Missouri.

Section 12 of Article VI, of the Constitution of the State of Missouri, reads as follows:

> "There is hereby established in the City of St. Louis an appellate court, to be known as the 'St. Louis Court of Appeals', the jurisdiction of which shall be coextensive with the City of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren. Said court shall have power to issue writs of *habeas corpus*, *quo warranto*, *mandamus*, *certiorari*, and other original remedial writs, and to hear and determine the same; and shall have a superintending control over all inferior courts of record in said counties. Appeals shall lie from the decisions of the St. Louis Court of Appeals to the Supreme Court, and writs of error may issue from the Supreme Court to said court in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; **in cases involving the construction of the Constitution of the United States or of the State; in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question**; in cases involving the construction of the revenue laws of this State, or the title to any office under this State; in cases involving title to real estate;

in cases where a county or other political subdivision of the State or any State officer is a party, and in all cases of felony."

In 1884 the Constitution of the State of Missouri was amended and the following constitutional provisions adopted:

"**Section 1. St. Louis Court of Appeals, Extended Jurisdiction—Judges.** The jurisdiction of the St. Louis Court of Appeals is hereby extended so as to be co-extensive with the counties of Monroe, Shelby, Knox, Scotland, Clark, Lewis, Marion, Ralls, Pike, Lincoln, Warren, St. Charles, St. Louis, Jefferson, Ste. Genevieve, Perry, Cape Girardeau, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Stoddard, Wayne, Bollinger, Madison, St. Francois, Washington, Franklin, Crawford, Iron, Reynolds, Carter, Butler, Ripley, Oregon, Shannon, Dent, Phelps, Pulaski, Texas, Howell, Ozark, Douglas, Wright, Laclede, Webster, Christian, Taney, Stone, Greene, Lawrence, Barry, Newton and McDonald, as well as the City of St. Louis; and each judge thereof, when hereafter elected, shall be elected by the qualified voters of the counties and of the city under the jurisdiction of said court, and shall be a resident of the said territorial appellate district.

Sec. 2. Kansas City Court of Appeals, Jurisdiction, Terms, Judges.—There is hereby established at Kansas City an Appellate Court, to be known as the Kansas City Court of Appeals, the jurisdiction of which shall be co-extensive with all

the counties in the State except those embraced in the jurisdiction of the St. Louis Court of Appeals. There shall be held in each year two terms of said Kansas City Court of Appeals, one on the first Monday of March and one on the first Monday of October. The Kansas City Court of Appeals shall consist of three Judges, who shall be elected by the qualified voters of the counties under the jurisdiction of said Court, and shall be residents of said territorial appellate district.

Sec. 3. Court of Appeals, One Additional May Be Establised—Districts, Terms and Pecuniary Jurisdiction May Be Changed—Transfer of Cases. —The General Assembly shall have power by law to create one additional Court of Appeals, with a new district therefor; to change the limits of the appellate districts, and the names of the Courts of Appeals, designating the districts by numbers or otherwise; to change the time of holding the terms of said courts; to increase or diminish the pecuniary limit of the jurisdiction of the Courts of appeals; to provide for the transfer of cases from one Court of Appeals to another Court of Appeals to provide for the transfer of cases from a Court of Appeals to the Supreme Court, and to provide for the hearing and determination of such cases by the Courts to which they may be transferred.

Sec. 4. Kansas City Court of Appeals—First Judges—Constitutional Provisions Applicable to. —The first term of said Kansas City Court of Appeals shall be held on the first Monday of March in the year 1885, and the first judges

thereof shall, upon the adoption of this amendment, be appointed by the Governor of said State for the term of four years each, beginning on the first day of January, 1885, and at the general election in the year 1888, the first election for the Judges of said court shall be held, and the provisions of the Constitution of the State concerning the organization, the Judges, the powers, the jurisdiction and proceedings of the St. Louis Court of Appeals, as herein amended, shall in all appropriate respects apply to the Kansas City Court of Appeals, and to such additional Court of Appeals as may be by law created.

Sec. 5. Supreme Court, Exclusive Appellate Jurisdiction of.—In all causes or proceedings reviewable by the Supreme Court, writs of error shall run from the Supreme Court directly to the Circuit Courts, and to courts having the jurisdiction pertaining to Circuit Courts, and in all such causes or proceedings, appeals shall lie from such trial courts directly to the Supreme Court, **and the Supreme Court shall have exclusive jurisdiction of such writs of error and appeals,** and shall, in all such cases exclusively exercise superintending control over such trial courts.

Sec. 6. Courts of Appeals Cases May Be Certified to Supreme Court, When.—When any one of said Courts of Appeals shall, in any cause or proceeding, render a decision which any one of the Judges therein sitting shall deem contrary to any previous decision of any one of said Courts of Appeals, or of the Supreme Court, the said Court of Appeals must, of its own motion, pending the

same term and not afterwards, certify and transfer said cause or proceeding and the original transcript therein to the Supreme Court, and thereupon the Supreme Court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; **and the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said Courts of Appeals.**''

In pursuance of this amendment to the Constitution, the Springfield Court of Appeals was established in 1909 (Sections 3927-3937, Revised Statutes of Missouri, 1909). Under the provisions of the Missouri Constitution the Court will note that the Supreme Court of the State of Missouri has exclusive jurisdiction in cases involving the construction of the Constitution of the United States or the State of Missouri, and in cases where the validity of a treaty or statute of or an authority exercised under the United States is drawn in question. Under the provisions of the Constitution of Missouri, also, the Springfield Court of Appeals is bound to follow the last previous rulings of the Supreme Court on any question of law. Therefore, if, in this case, there was involved the construction of the Constitution of the United States or of the State of Missouri, or if any question arose as to the constitutionality of any statute of the State

of Missouri, the Supreme Court had exclusive jurisdiction of the appeal.

The fact that there was no constitutional question involved is evidenced by the four opinions rendered by the Missouri courts, namely: Mergenthaler Linotype Co. v. Hays, 182 Mo. App. 113, 168 S. W. 239; Mergenthaler Linotype Co. v. Hays, 181 S. W. 1183; State *ex rel.* Hays v. Robertson *et al.*, 271 Mo. 475, 196 S. W. 1132; Mergenthaler Linotype Co. v. Hays, 202 S. W. 300.

Section 8 of the Amendment of 1884 to the Constitution of Missouri, also provides as follows:

> "The Supreme Court shall have superintending control over the Courts of Appeals by **mandamus, prohibition** and **certiorari.**"

In this case, in pursuance to the provisions of the Constitution of Missouri, after the rendition of the second opinion by the Springfield Court of Appeals (Mergenthaler Linotype Co. v. Hays, 181 S. W. 1183), the Supreme Court of the State, in its opinion in the *certiorari* proceeding, State *ex rel.* Hays v. Robertson *et al.*, 271 Mo. 475, 196 S. W. 1132 (Tr., pp. 69 to 77), quashed said opinion, and thereupon, in pursuance to the mandate of the Constitution, the Springfield Court of Appeals rendered the final opinion, which it is sought to review by this writ of error. There was no writ of error sued out from the decision of

Missouri Supreme Court on the ground that the construction given by the trial court to the law rendered it obnoxious to the State and Federal constitutions. The jurisdiction of the court was objected to on the ground that the Missouri Supreme Court had held the law constitutional in the case of *Henry & Coatsworth Company* vs. *Evans*, 97 Mo., 47, 10 S. W. Rep. 868.

The Supreme Court in holding that this fact divested it of any jurisdiction to decide the matter, says at page 169:

> "It is not claimed in the brief of the appellant that the decision of the Kansas City Court of Appeals is in conflict with the last or any previous ruling of this court. On the contrary, after the rendition of the judgment of the Kansas City Court of Appeals reversing and remanding the present case, it was retried in the circuit court, and having resulted in a judgment against the owner of the building, it was appealed directly to this court upon the notion that such a result infringed the constitutional rights of defendant (appellant) in that such judgment would deprive it of its property without due process of law and of the equal protection of the law. As against these objections the Mechanics' lien law was fully upheld by this court in *Henry & Coatsworth Co.* vs. *Evans*, (supra). It was therefore clearly incompetent for defendant, by reiterating those objections, to lodge appellate jurisdiction in this court of a case (like the present) which fell strictly within the appellate jurisdiction of the Kansas City Court of Appeals."

To the same effect are the decisions of the Missouri Supreme Court in the following cases:

Lewis vs. *New York Life Insurance Company,* 201 Southwestern Reporter, 851, decided March 4th, 1918.

Non-Reyalty Shoe Company vs. *Phoenix Assurance Company, Ltd.,* 210 Southwestern Reporter 37, at page 43, decided December 23d, 1918;

State vs. *Swift & Company,* 195 Southwestern Reporter 996, decided May 29th, 1917;

State vs. *Wild,* 190, Southwestern Reporter 273, decided December 8th, 1916;

State vs. *Evertz,* 190 Southwestern Reporter, 287, decided December 6th, 1916.

It follows from the foregoing decisions that the Missouri Supreme Court would have no jurisdiction to pass upon the constitutionality of the provisions of sections 3039 and 3040 of the Revised Statutes of Missouri of 1909, if the court had in a previous case already considered and passed upon them. This it had done. These sections were an exact re-enactment of Missouri Laws of 1891, page 75 and were held constitutional by the Missouri Supreme Court in the case of Roeder vs. Robertson, 202 Missouri 522, at pages 531, 534 and 536.

Attention is now invited to the determination by the Missouri Supreme Court that it has no jurisdiction of a case involving a constitutional question if the general validity of the statute in question is not attacked, but the attack is directed at the manner in which the statue is interpreted.

This ruling has been made on a number of occasions, and as the point is believed to be of great importance in the instant case, we crave the indulgence of the court to our extended reference to some of the cases so holding.

The first in point of time of decision is *Donoho vs. Missouri Pacific Railroad Company* (184 S. W. Rep., 1149, decided February 15th, 1916. The error here alleged was that a refusal by the trial court to make certain requested charges amounted to a deprivation of appellant's constitutional rights. The court refusing to take jurisdiction said at page 1150:

> "It will be observed that these objections do not go to the validity of legislative acts, or the absence of due process, as these terms are defined, but to the correctness of an interpretation of a contract by a court of lawful jurisdiction. The most that could be said is that the court erred when judicially construing the agreement, and, if so, the Court of Appeals is the tribunal designated by law to correct the error. We cannot assume, any more for jurisdictional purposes than for others, that the Court of Appeals will decide incorrectly, or so construe a plain contract as to violate the law or the Constitution. To hold otherwise would be to usurp powers expressly denied us, and to destroy the jurisdiction of a part of the State's judiciary."

The question involved in *State vs. Chicago, M. & St. P. R. R. Co.* (199 S. W. Rep., 121, decided December 4th, 1917) was as to the correctness of appellant's conviction in view of the subsequent

legislation of Congress on the subject, for disobedience of a state statute requiring an interstate shipper of cattle to attach an inspection certificate to the waybill.

The Missouri Supreme Court in transferring the case to the Kansas City Court of Appeals for determination, says at page 122:

> "The validity of no federal statute is drawn in question, nor is any portion of our state or federal Constitution sought to be construed. The appellant's position is that Congress has legislated concerning this exact subject-matter and that therefore the federal statute supplants the state statute. The position taken by the state is not that the federal statute is void, or that Congress has no power to pass such an act, but that the federal statute mentioned does not cover the subject matter of this case. Under such circumstances a determination of the case involves not the validity but merely the construction of the federal act, and hence no question is involved conferring jurisdiction here" (Const. Mo. Art., 6, §12).

Finally there is the decision in *Mitchell* vs. *Joplin National Bank,* (201 S. W. Rep., 903, decided March 4th, 1919) which is extremely illuminating not only in connection with the particular point now under discussion, but on the general question of whether the writ of error in this action was rightly directed.

In this action plaintiff sought under §5197 Rev. St. U. S., to collect double the usurious interest alleged to have been charged by a national bank.

After judgment for plaintiff the defendant appealed to the Springfield Court of Appeals which transferred the case to the Supreme Court on the ground that a federal question was involved. Defendant's answer in the action set up that if usurious interest was charged the action was not brought in time and furthermore such charge was a mistake. Plaintiff replied by general denial.

The court in re-transferring the case to the Springfield Court of Appeals says at page 904:—

> "Before taking cognizance of this appeal, it is necessary to determine the correctness of the view expressed by the Springfield Court of Appeals that its jurisdiction was excluded under the provisions of the Constitution of 1875, Art, 6, §12 and the amendment thereof in 1884 §5. As far as pertinent to the matter in hand, these provisions of the Constitution vested exclusive jurisdiction in this court in cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question. In accordance with the obvious import of this language, *it has been repeatedly ruled in this state that the interpretation and application of the terms of a federal statute whose validity is not drawn in question by either party are not within the intendment of the Constitutional provisions, and do not of themselves, suffice to bring an appeal to this court which would otherwise be lodged in one of the courts of appeals*" (Citing cases).

At page 905:

> "In the case at bar the federal statutes upon which the petition is founded were not claimed

to be illegal by either party. The issues joined merely call for a construction of these statutes and the application of their language to the facts in judgment. *This duty could have been performed by the Springfield Court of Appeals, and in so doing that tribunal had reached a conclusion which deprived either of the parties to the action of any 'right, privilege or immunity * * * claimed under the Constitution * * * or statute of * * * the United States' then the party against whom such adverse decision might have been made would have been entitled to a re-examination and review thereof by the Supreme Court of the United States by writ of error to the Springfield Court of Appeals.* Railroad vs. Pearce, 192 U. S., 179, 24 Sup. Ct., 231, 48 L. ed., 397, Union K. & T. Ry vs. Elliot, 184 U. S., 539, 22 Sup. Ct., 446, 46 L. ed., 673. *For in that event the judgment of the Springfield Court of Appeals would have been that of the highest court of the state in which the decision in suit could have been had,* and would have been receiveable by the Supreme Court of the United States under the express provision of the statute.

* * * * * * * *

The Constitution does not give this court jurisdiction in the broad language of the Springfield Court of Appeals, to-wit, 'in all cases where a federal question is involved.' On the contrary, it limits the jurisdiction of this court as to the enforcement of federal statutes to cases where the validity of the

statute sought to be enforced is questioned. Unless this is done, the jurisdiction of the Court of Appeals to construe and apply a federal statute in a case otherwise falling within its appellate jurisdiction cannot be defeated by the parties to the action.

* * * * * * * *

In the instant case the only matter in issue between the parties was the application of the federal statutes regulating the right of national banks to charge interest on money lent. No question as to the constitutionality or validity of the statutes in question was attempted to be made by either party. The sole issue between them was as to the meaning and interpretation to be given to the language of the statutes, and as to the respective rights accruing to each from the provisions of the statutes."

At page 906:

"The power of ultimate review of the construction and interpretation of federal statutes reserved to the Supreme Court of the United States has nothing to do with the appellate procedure prescribed by the Constitution of this State distinguishing the classes of appeals or writs of error to this court from those to be taken to the Courts of Appeals, which is clearly a matter of state regulation." (Italics are ours.)

To the same effect is the somewhat later decision of *Hawkins* vs. *St. Louis & San Francisco Railroad*

Company, 202, Southwestern Reporter 1060, at page 1063.

As in the Mitchell case, just cited, the contention in the instant case was not abstractly speaking, that sections 3039 and 3040, R. S. of Missouri, 1909 were unconstitutional, but that when applied to the particular facts of the case which showed that plaintiff was engaged in interstate commerce, they amounted to a deprivation of plaintiff's constitutional rights. The question presented was one of interpretation, it being plaintiff's contention that the authority exercised under such statutory sections by the state, was, on the facts of the case, repugnant to the Constitution of the United States.

Such being the fact, the only jurisdiction which could possibly attach to the Missouri Supreme Court in the case was by writ of certiorari to determine whether or not the original judgment of the Springfield Court of Appeals was in conflict with one of the prior decisions of the Supreme Court. This it did. The situation was therefore identical with that disclosed and passed upon in *State ex rel. Miles* vs. *Ellison,* (269 No. 151, 190 S. W. Rep. 274) where the court says at page 156:

> "We have no original appellate jurisdiction of this cause, and our review is limited to the question of whether the Court of Appeals, in holding as it did, went contrary to the last previous rulings of this court. While this court has recently done considerable writing and its members expressed divergent views as to what constitutes our record of cases of this class, *we all yield assent to the one proposition that the Courts of Appeals are courts of*

last resort, and when acting within their jurisdiction, and not in violation of our decisions, can decide cases as their judgment dictates, and in so doing can, without interference on our part, commit error and decide incorrectly, just as we can."

The Supreme Court in the instant case determined that the opinion and judgment of the Springfield Court of Appeals did conflict with a former opinion and consequently quashed it, and the case was remitted to the Court of Appeals which, in accordance with its constitutional obligation entered a judgment in conformity with the opinion of the Supreme Court of Missouri. The extent of the authority of the Supreme Court in such proceeding is defined in its opinion in the case of *Schmohl* vs. *Traveler's Insurance Company,* (197 S. W. Rep. 60, decided June 30, 1917), in the following manner:

At page 62:

"In the case at bar, when we quashed the first record of the Court of Appeals therein the case then stood in that court just as if it had never been decided. Our opinion in the certiorari case, it is true, should have been their guide upon a further hearing, so far as the question there disposed of was concerned. This because it was the last opinion of this court upon the question of law there discussed."

Again

"It is the judicial determination of the dissenting judge that the majority opinion of the

Court of Appeals is in conflict with our rulings that gives us jurisdiction of a case otherwise cognizable before the Court of Appeals. His judgment may be faultly, and even more, yet it is the thing which the Constitution says changes the jurisdiction."

At page63:

"Nor do I agree to the announced doctrine that in certiorari we can direct the Court of Appeals what action they shall take in the case after we have quashed their judgment and opinion. We have no such authority in certiorari."

The court then discusses the case of state ex rel. Atchison, T. & S. F. Ry. Co. vs. Ellison, 268 Mo. 225, 186, S. W. 1075 and says:

"In this case he announced the true rule (268 Mo. loc. Cit. 238, 186, S. W. 1078) thus: 'We are urged by relators learned counsel to quash the judgment of the Kansas City Court of Appeals and render now and here final judgment in the case of H. C. Smith, Appellant vs. Atchison, Topeka & Santa Fe Railway Co. Respondent, 192 Mo. App. 210. Absent a statute so permitting—and we have none—we have no earthly power to do this. *We can undo what the Court of Appeals has done: we can state on the point of contrariety of decision the rule which in our opinion ought to govern that court upon another hearing, and we can send the record back to them to be heard anew by them * * * but in the Kansas City Court of Appeals alone lies the juris-*

diction to hear and to correctly and finally determine the case to which the instant proceeding is ancillary'" (Italics are ours.)

Upon the question of the judgment and the remission of the Case to the Springfield Court of Appeals, the case was incomplete—there was no final judgment and that a final judgment could be entered, it was necessary that the Court of Appeals act, which it did. The judgment of the Supreme Court merely decided the point that the Court of Appeals had not followed the last previous decision of the Supreme Court on the question presented, and that its judgment was consequently illegal. An appeal from the Supreme Court's judgment of quashal would therefore have been premature.

Grays Harbor Logging Company vs. *Coats-Fordney Logging Company*, 243 U. S., 251, 61 L. Ed., 702;

Cornell Steamboat Company vs. *Phoenix Construction Company*, 233 U. S., 592, 58 L. Ed., 1107;

Louisiana Navigation Company vs. *Oyster Commission of Louisiana*, 226 U. S., 99, 100, 57 L. Ed., 138;

Norfolk & Suburban Turnpike Co. vs. *Commonwealth of Virginia*, 225 U. S. 264, 267, 268, 269, 56 L. Ed., 1085;

Western Union Telegraph Company vs. *Crovo*, 220 U. S., 363, 366, 55 L. Ed., 498.

As is said by this court in *Bruce* vs. *Tobin* (245 U. S., 18, 62 L. Ed., 123) at page 19, "the finality contemplated" is "to be determined by the face of

the record and the formal character of the judgment rendered * * *"

Applying this test, the judgment of the Missouri Supreme Court was incomplete and that of the Springfield Court of Appeals, to which this writ of error was sued, was final, and since that final judgment was in conformity with the decision of the Missouri Supreme Court, the latter had no further jurisdiction or authority in the case, under the decisions above cited, and plaintiff's only remedy for correction was by writ of error to the United States Supreme Court.

This brief has already exceeded reasonable lengths for which reason particular comment upon and analysis of the citations of authorities of defendant in error on this point, will not be undertaken. Suffice it to say that the most recent of the cases which he cites under "VI" of his " Points and Authorities," was decided on March 31st, 1909. The decisions do not decide the points for which they are cited, and even if they did, must be held to be overruled by the recent decisions to which attention has been invited.

Attention is invited to the fact that aside from one or two loose dicta, the cases cited under Point VI of the "Points" of defendant in error gives no semblance of support for the general position stated in Point VII. An even coursary reading of Missouri decisions demonstrates that the rule in that jurisdiction is the one which universally prevails, namely, that constitutional rights must be asserted at the first available opportunity after their infringement. This point is clearly shown by the language of the Missouri Supreme Court in Donoho vs. Missouri Pacific Railroad, ubi supra, where the court says at page 1150:

"Although neither the pleadings nor objections to evidence in any manner refer to a constitutional subject, its non-existence is not due to a failure of earlier appearance. The particular question which defendant insists upon could not have been invoked any sooner than it was."

In the case of Mitchell vs. Joplin National Bank, it appears that the Supreme Court would consider a constitutional question raised in time under the facts of certain cases even after a determination by the Court of Appeals.

In that instant case, as has been shown, plaintiff introduced the constitutional point into the case at the very start, and maintained it until the end.

* * * * * * * * *

It is therefore submitted that since the constitutional question in disput was raised and expressly passed upon by every court through which the case progressed; since the Missouri Supreme Court, under its decisions had no constitutional right to determine the case other than on certiorari, and did so determine it, quashing the judgment of the Springfield Court of Appeals, which court thereafter entered a final judgment which under Missouri practice was not subject to review, that this writ of error was properly laid, and the present motion should be dismissed.

New York City, December 3d, 1919.

Respectfully submitted,

BRADFORD BUTLER,
Counsel for Plaintiff in Error,
Mergenthaler Linotype Company.

MERGENTHALER LINOTYPE COMPANY *v.* DAVIS ET AL.

ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 192. Motion to dismiss submitted December 8, 1919.—Decided January 5, 1920.

The Supreme Court of Missouri, exercising by certiorari its superintending control under the state constitution, quashed a judgment of affirmance by the Court of Appeals, because inconsistent with a prior decision of the Supreme Court, and remanded the cause to the Court of Appeals for decision. *Held*, that a second judgment of the latter court reversing and disposing of the cause was directly reviewable by this court, under Jud. Code, § 237, there being no opportunity for further review by the Supreme Court of the State. P. 258.

A federal question first presented to the state court by a petition for rehearing which was overruled without more, is not a basis for review in this court. *Id.*

A claim that a lease contract was made in interstate commerce and was therefore not subject to state statutes, does not sufficiently challenge their validity, but asserts at most a "title, right, privilege, or immunity" under the Constitution, which might afford ground for certiorari, but not for writ of error, under Jud. Code, § 237, as amended. P. 259.

Writ of error to review 271 Missouri, 475, dismissed.

THE case is stated in the opinion.

Mr. Ernest A. Green and *Mr. J. C. Sheppard*, for defendants in error, in support of the motion. *Mr. A. L. Sheppard* was on the brief.

Mr. Bradford Butler, for plaintiff in error, in opposition to the motion.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Dismissal of this writ is asked—*first*, because it does not run to a final judgment "in the highest court of a State in which a decision in the suit could be had"; *second*, because there was not properly drawn in question below "the validity of a treaty or statute of, or an authority exercised under the United States" or "the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States." Judicial Code, § 237; Act September 6, 1916, c. 448, 39 Stat. 726; *Coon* v. *Kennedy*, 248 U. S. 457; *Godchaux Co.* v. *Estopinal*, *ante*, 179.

The trial court, proceeding without jury, gave judgment for rentals due the Linotype Company under written lease of a machine, etc. The Springfield Court of Appeals affirmed that action. Thereupon the Supreme Court took jurisdiction by writ of certiorari, rendered an opinion, quashed the judgment of affirmance, and remanded the cause to the Court of Appeals for decision. 271 Missouri, 475.

Following the Supreme Court's opinion, the Court of Appeals ordered the judgment of the trial court "reversed, annulled and for naught held and esteemed; that the said appellants be restored to all they have lost by reason of the said judgment; that the said appellants recover of the said respondent costs and charges herein expended, and have execution therefor." A motion there for rehearing having been overruled, without more, this writ of error was sued out.

The assignments of error here challenge the validity of §§ 3037–3040 and § 3342, Revised Statutes of Missouri, 1909, because in conflict with the Federal Constitution. This claim was first set up in the Court of Appeals upon the motion for rehearing.

The Missouri constitution gives the Supreme Court "superintending control over the courts of appeals by *mandamus*, prohibition and *certiorari*," and provides that "the last previous rulings of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals." In *State ex rel.* v. *Ellison*, 268 Missouri, 225, 238, a proceeding upon certiorari, the court declared: "We can undo what the Court of Appeals has done; . . . and we can send the record back to them to be heard anew by them, . . . but in the Kansas City Court of Appeals alone lies the jurisdiction to hear and to correctly and finally determine the case to which the instant proceeding is ancillary." See also, *State ex rel.* v. *Ellison*, 269 Missouri, 151; *Schmohl* v. *Travelers' Ins. Co.*, 197 S. W. Rep. 60.

In the present cause, the Supreme Court said: "This is an original proceeding by certiorari. . . . It is urged by relator as his grounds for quashal, that the opinion of the Court of Appeals is in conflict with the case of *United Shoe Machinery Co.* v. *Ramlose*, 210 Missouri, 631. . . . If this decision be opposed to what we said, or the conclusion which we reached upon similar facts (if the facts are similar) in the *Ramlose case*, we ought to quash the judgment of the Court of Appeals. This is the sole question to be determined."

Under the Missouri practice and circumstances here disclosed, we think the judgment of the Springfield Court of Appeals was final within the meaning of § 237, Judicial Code. No suggestion is made that further review by the Supreme Court could be had, as matter of discretion or otherwise.

The only ground mentioned in the assignments of error upon which this writ could be sustained is conflict between specified sections of the Missouri statutes relating to transactions by foreign corporations and the Federal Constitution. But this point came too late, being first

advanced below on the motion for rehearing. *Godchaux Co.* v. *Estopinal, supra.*

The claim that the lease contract was made in course of interstate commerce and therefore not subject to state statutes, was insufficient to challenge the validity of the latter; at most it but asserted a "title, right, privilege, or immunity" under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error from this court.

Dismissed.